TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. 7[redacted]210

PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ISAAC C. WEBER, SURVIVING PARTNER OF W. J. JACOBY AND ISAAC C. WEBER, COPARTNERS, TRADING UNDER THE FIRM NAME OF W. F. JACOBY & COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED JANUARY 27, 1921.

(28,063)

(28,063)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 706.

PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ISAAC C. WEBER, SURVIVING PARTNER OF W. J. JACOBY AND ISAAC C. WEBER, COPARTNERS, TRADING UNDER THE FIRM NAME OF W. F. JACOBY & COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

District Court of the United States,

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

June Sessions, 1912. No. 2008.

ISAAC C. WEBER, Surviving Partner of W. F. JACOBY and ISAAC C. WEBER, co-partners, trading under the firm name of W. F. JACOBY & COMPANY,	Francis I. Gowen.
v.	
PENNSYLVANIA RAILROAD COMPANY.	Wm. A. Glasgow, Jr.

DOCKET ENTRIES.

July 19, 1912. Petition filed.

" 19, " Order directing defendant to plead, answer or demur within thirty days of service of copy of this order, filed.

" 27, " Proof of service of Petition and Order, filed.

Aug. 8, 1912. Order for the appearance of John G. Johnson, Esquire, for defendant, filed.

" 17, " Stipulation that defendant may plead, answer or demur on or before September 18, 1912, and that case be placed on trial list subject to such plea, &c., filed.

Sept.	18, 1912.	Demurrer filed.
Oct.	4, 1912.	Argued.
Nov.	12, 1912.	Opinion, Thompson, J., overruling demurrer, filed.
"	16, "	Plea filed.
Dec.	7, 1912.	Order to place case on trial list, filed.
Mch.	3, 1913.	Jury called.
"	4, "	Verdict for plaintiff $28,572.54.
"	8, "	Plaintiff's Bill of Costs filed.
"	8, "	Motion for judgment non abstante veredicto filed.
"	8, "	Motion and reasons for new trial, filed.
"	24, "	Argued sur motions for new trial and for judgment n. o. v.
Apr.	4, 1913.	Order refusing motions for new trial and for judgment n. o. v., filed.
"	8, "	Bill of Exceptions filed.
May	19, 1913.	Order allowing counsel fees and granting exceptions, filed.
"	21, "	Praecipe for judgment filed. Judgment accordingly.
"	21, "	Assignments of error, filed.
"	21, "	Petition for Writ of Error and Order of Allowance filed.
"	23, "	Bond sur Writ of Error in sum of $57,145.08 and Order of approval, filed.
"	23, "	Writ of Error allowed and copy thereof lodged in Clerk's office for adverse party.
"	23, "	Citation allowed and issued.
"	23, "	Praecipe sur transcript of record, filed.
"	26, "	Citation returned "Service accepted" and filed.

June 27, 1913. Transcript of record sur writ of error transmitted to Clerk of U. S. C. C. of Appeals.

Feby. 23, 1916. Release of certain real estate filed, being release of premises in Philadelphia, Pa., viz.:

(1) In 34th Ward, bounded N. W. by Woodbine Ave., on E. by 57th St., on S. by Jefferson St., and on W. by Upland Way.

(2) In 34th Ward, bounded on N. E. by Lancaster Ave., on S. by Jefferson St., and on W. by 60th St.

(3) In 24th Ward, at S. W. cor. Westminster Ave. & 40th St., front on St. and Ave., 148 ft. 3¼ inches, and 83 ft. 1⅜ inches on rear on Wiota St.

(4) In 24th Ward, N. S. Pennsgrove St., about 34 ft. 6½ inches S. W. of 38th St., 177 ft. 3¾ inches on Pennsgrove by 67 ft. 6 inches.

(5) 24th Ward, N. E. S. Lancaster Ave., 185 ft. 5⅛ inches W. of 33 St., 100 ft. by N. E. to Cuthbert.

(6) 33rd Ward, bounded on N. by Luzerne St., on E. by G St., on S. by Tioga St., and on W. by Second St.

(7) 45th Ward, N. E. side Westmoreland St., between Gaul & Miller Sts., depth on Gaul 76 ft. 2⅞ inches and on Miller St. 61 ft. 11 inches.

Sept.	6, 1917.	Mandate of U. S. Supreme Court reversing the Judgment of this Court with costs, received and filed.
June	27, 1919.	Suggestion of death of W. F. Jacoby and Motion to revive action, filed.
"	27, "	Order to place case on trial list, filed.
Oct.	24, 1919.	Jury called—see minutes—witnesses sworn.
"	27, "	Trial resumed.
Nov.	24, 1919.	Trial resumed—witnesses sworn.
"	25, "	Trial resumed.
"	25, "	Verdict for plaintiff—Damages assessed at Thirty-six thousand and Seven Hundred eighty-seven and 45 100 ($36,787.45) Dollars.
"	29, "	Order of Court extending time for filing Motion and Reasons for new trial, filed.
Dec.	4, 1919.	Motion for new trial, filed.
"	29, "	Argued sur motion for new trial.
Mar.	8, 1920.	Opinion, Thompson, J., denying motion for new trial, filed.
"	10, "	Praecipe to enter judgment in favor of plaintiff filed.
"	10, "	Judgment filed.
"	17, "	Bill of Exceptions, filed.
"	17, "	Order of Court sealing Bill of Exceptions, filed.
"	17, "	Assignments of Error, filed.
"	17, "	Petition for Writ of Error, filed.
"	17, "	Order of Court granting prayer of petition, filed.
"	18, "	Bond sur Writ of Error with U. S. Guaranty Company surety in $73,574.90, filed.
"	18, "	Order of Court approving Bond sur Writ of Error filed.

Mar. 19, 1920. Writ of Error allowed and copy thereof lodged in Clerk's office for adverse party.
" 19, " Citation allowed and issued.
" 23, " Citation returned "service accepted" and filed.
" 23, " Praecipe for transcript of record sur Writ of Error, filed.

WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss.:*

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania,

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Isaac C. Weber, surviving partner of W. F. Jacoby, and Isaac C. Weber, co-partners, trading under the firm name of W. F. Jacoby & Company, and Pennsylvania Railroad Company, a manifest error hath happened, to the great damage of the said Pennsylvania Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have

the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, at Philadelphia, the (Seal) nineteenth day of March, in the year of our Lord one thousand nine hundred and twenty.

GEORGE BRODBECK,
Clerk of the District Court
of the United States.

Allowed by
J. W. THOMPSON, *J.*

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

W. F. Jacoby and Isaac C. Weber, co-partners, trading under the firm name of W. F. Jacoby & Company,
Petitioners,

v.

Pennsylvania Railroad Company,
Defendant.

PETITION.
(Filed July 19, 1912.)

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Your petitioners, W. F. Jacoby and Isaac C. Weber, co-partners, trading under the firm name of W. F. Jacoby & Company, having their principal place of business in the City and County of Philadelphia, and State of Pennsylvania, and who are citizens and residents of the City of Philadelphia, State of Pennsylvania, in the Eastern District of Pennsylvania, humbly complaining show your Honors:

I.

Your petitioners are lawfully and rightfully entitled to receive, and do hereby claim from the defendant above named the sum of twenty-one thousand, ninety-four dollars and thirty-nine cents ($21,094.39) with legal interest from June 28, 1907, to June 1, 1912, amounting to six thousand, two hundred and thirty-eight dollars and sixteen cents ($6238.16), being the sum of twenty-seven thousand, three hundred and thirty-two dollars and fifty-five cents ($27,332.55)

with legal interest thereon from June 1, 1912, as and for damages and reparation in accordance with a report and order of the Interstate Commerce Commission, dated March 11, 1912, a copy whereof is hereto attached, marked "Exhibit A," and prayed to be made and read as a part hereof, and in accordance with the several Acts of Congress in such case made and provided; and the defendant justly and legally owes to petitioners the sum above set forth, together with legal interest thereon from June 1, 1912, and a reasonable attorney's fee to be taxed as part of the costs against defendant.

II.

The defendant prior to any and all dates mentioned in this petition was and now is a corporation incorporated under the laws of the State of Pennsylvania, and a common carrier engaged in interstate commerce by transportation of passengers and property by continuous carriage by railroad over their own lines and as connecting carriers from points of origin in Pennsylvania to points outside of Pennsylvania throughout the United States and to Canada and Mexico, and has its principal operating office in Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, through which said city and in which Eastern District of Pennsylvania the line of said defendant runs and is operated.

III.

During the period from April 1, 1904, to October 18, 1905, petitioners were lessees of a tract of bituminous coal land situated in Bigler Township, Clearfield County, Pennsylvania, and operated thereon a fully equipped colliery known as Falcon No. 2, which colliery was adjacent to the tracks of the Moshannon Branch of the Tyrone & Clearfield Railway, one of the main

branches of defendant's line, and operated by defendant as its Tyrone Division, and, during said period, petitioners were continuously engaged in mining coal at said mine and selling it to points outside of the State of Pennsylvania, and maintained at said colliery a full mining equipment and a sufficient force of employees. During the same period the daily capacity of said Falcon No. 2 mine was four hundred and fifty (450) gross tons of coal per working day, which quantity petitioners were always able and prepared during said period to mine, ship and sell, had they been supplied by the defendant with sufficient cars to transport the same, but defendant did not furnish plaintiffs with sufficient cars to transport their coal, as aforesaid, nor did it furnish to petitioners their proper pro rata of the cars upon defendant's line but in its distribution of railroad cars to mines along its line, the defendant unjustly discriminated against petitioners' mine, Falcon No. 2, and gave undue and unreasonable preference and advantage of mines operated by the Berwind-White Coal Mining Company and other shippers on the Tyrone Division, particularly to shippers whose mines were situated upon the Moshannon Branch of the Tyrone Division, in close proximity to Falcon No. 2, and having, in common with it, their sole outlet to market by way of defendant's lines, whereby defendant violated its duty as a common carrier and petitioners were put to great and unjust disadvantage and were unable to ship coal to market which they were able to mine, and for the sale of which they had orders for delivery to points outside the State of Pennsylvania, and because of defendant's refusal to adequately supply petitioners' need for cars, and because of such unjust discrimination against petitioners in the daily car distribution of cars upon defendant's line, and in particular upon the Tyrone Division, petitioners were damaged and suffered loss as producers, shippers and

sellers of coal in the interstate coal trade and were deprived of profits which they would otherwise have made upon coal which they were unable to ship and sell, and for which they were unable to accept contracts, though such contracts were available, by reason of defendant's undue and wrongful discrimination and refusal to properly supply them with cars as aforesaid.

IV.

The mines owned, operated and controlled by the Berwind-White Coal Mining Company, and other favored companies, as aforesaid, are situated upon the Moshannon Branch of the Tyrone & Clearfield Railway, on the Tyrone Division of said respondent in close proximity to the Falcon No. 2 mine, owned by petitioners, and have a common outlet with petitioners' said mine to reach the markets for bituminous coal, either within or without the State of Pennsylvania, over the lines of the defendant company and there are no circumstances or conditions of carriage as against petitioners' mine, Falcon No. 2 aforesaid.

Between April 1, 1904, and October 18, 1905, petitioners made daily requests and gave daily orders for coal cars to be delivered to their said mine to be loaded with coal for transportation to points and places beyond the State of Pennsylvania, but were denied and refused cars and were unduly and unreasonably discriminated against by respondent in the distribution of coal cars, whereby petitioners were at different times and for varying periods of time compelled to close their operation and hold their mine idle, whereby its miners and laborers removed and its organization and plant became demoralized and disorganized, and whereby petitioners were prevented from filling valuable contracts or from accepting and securing other valuable contracts, to their great damage as herein set forth.

During the periods from April 1, 1904, to April 1, 1905, and from April 1, 1905, to October 15, 1905, defendant arbitrarily assigned and furnished to the favored mines aforesaid in the Tyrone Division, not less than 63,284 "assigned" (arbitrary) cars, which said cars were assigned as "private," "commercial" and "company fuel" cars, and were not charged against the *pro rata* share of said favored mines in making up the distribution sheets for said division and did not enter into the distribution of the coal cars among the mines in the said division, whereby said favored companies were given the cars aforesaid over and above and in addition to their fair *pro rata* of cars in the division, and were illegally and wrongfully preferred in car distribution as aforesaid in said division. And during the same periods petitioners' mine, Falcon No. 2, received only a few arbitrary cars, and these were charged against said mine's distributive share in the ratings for the division.

During the same periods respondent unduly and unjustly discriminated against the Clearfield Division in which petitioners' said mine was located by the arbitrary award of not less than 640 coal cars per day to other divisions, for the use of favored mines in said divisions, over and above the proper proportion to which said divisions were properly entitled, to the prejudice of non-favored mines in the Clearfield Division, and in particular of your petitioners' mine, Falcon No. 2.

V.

The petitioners, in June, 1907, duly filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practices of defendant to the prejudice of petitioners and in violation of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory

and supplemental thereto, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Commission make an order awarding complainants therein reparation in damages to such an amount as it might be ascertained that said complainants had thereby suffered. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the cause regularly heard and argued by all the parties thereto, and submitted, and resulted in a finding duly filed and reported by the Interstate Commerce Commission at a general session at its offices in Washington, D. C., on Docket No. 1139, Opinion No. 1384, dated March 7, 1910, a copy of which finding with the conclusions and orders of the Commission is hereto attached and marked Exhibit "B," and made a part of this petition.

VI.

After the filing of briefs by all parties and oral argument had at a general session of the Commission, and the submission of findings of fact and of law on the part of complainants and of defendant, upon the question of reparation alone, there resulted a further finding regularly and properly made by the Commission on March 11, 1912, ordering the defendant to make reparation to petitioners as in paragraph 1 of this petition above set forth, and as fully appears in the copy of the report, conclusions and order of the Interstate Commerce Commission in Opinion No. 1833, Docket No. 1139, dated March 11, 1912, a certified copy whereof is hereto attached, marked Exhibit "A," and made a part of this petition.

VII.

Petitioners aver that a true copy of the aforesaid order of the Interstate Commerce Commission dated March 11, 1912, Opinion No. 1833, Docket No. 1139, was

duly served upon defendant in the above-entitled cause, and demand made that defendant pay petitioners the sum claimed in this petition, and as set forth in the aforesaid order of the Commission, dated March 11, 1912, Exhibit "C," hereto attached, but that defendant has wholly failed, neglected and refused to pay the said sum or any part thereof, and that no such sum or any part thereof has been paid by defendant or any one on its behalf to petitioners or any one in their behalf. Wherefore petitioners have instituted this proceeding to enforce the aforesaid order regularly and lawfully made under the Act to Regulate Commerce, approved February 4, 1887, and the acts amendatory thereof or supplemental thereto.

Wherefore, the said W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, as aforesaid, respectfully pray:

First.—That your Honorable Court enter a rule and order upon the said defendant, the Pennsylvania Railroad Company, to file a plea, answer or demurrer to this petition within thirty days from date of service of a copy of the same upon said defendant.

Second.—That your Honorable Court will, by its order, fix a time and place for a trial of this cause, under the provisions of the Act to Regulate Commerce aforesaid.

Third.—That your Honorable Court will hear, determine and adjudicate the matter involved in this cause hereinabove recited and the exhibits hereto attached.

Fourth.—That your Honorable Court will enter judgment in favor of petitioners and against the said defendant, the Pennsylvania Railroad Company, for

the sum of twenty-seven thousand, three hundred and thirty-two dollars and fifty-five cents ($27,332.55) as hereinbefore set forth, with legal interest thereon from June 1, 1912, and costs including a reasonable attorney's fee.

Fifth.—That your Honorable Court may make such other order or orders in the premises as the necessity of the case may require or as to your Honorable Court may seem meet.

And your petitioners, as in duty bound, will ever pray, etc.

WM. A. GLASGOW, JR.,
Counsel for Petitioners.
1018 Real Estate Trust Building,
Philadelphia, Pa.

STATE OF PENNSYLVANIA, } *ss.:*
COUNTY OF PHILADELPHIA, }

W. F. Jacoby, being duly sworn, deposes and says that he is one of the petitioners in the above-entitled cause, and that the facts set forth in the foregoing petition are true and correct, to the best of his knowledge, information and belief.

Sworn and subscribed to before me this 18th day of July, A. D. 1912. } W. J. JACOBY.

JOHN H. HALL,
(Seal) *Notary Public.*
My commission expires January 16, 1915.

EXHIBIT "A."

Opinion No. 1833.

INTERSTATE COMMERCE COMMISSION.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

v.

SAME.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

No. 1136.

JAMES H. MINDS AND JULIA A. MATZ, TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

No. 1137.

JAMES H. MINDS, SURVIVING AND LIQUIDATING PARTNER OF JAMES H. MINDS AND WILLIAM J. MATZ, LATELY TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

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No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

No. 1136.

JAMES H. MINDS AND JULIA A. MATZ, TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

No. 1137.

JAMES H. MINDS, SURVIVING AND LIQUIDATING PARTNER OF JAMES H. MINDS AND WILLIAM J. MATZ, LATELY TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

Submitted April 20, 1911. Decided March 11, 1912.

Reparation awarded for damages resulting from discriminations practiced by the defendant in the distribution of coal cars.

David L. Krebs, Harry White, and *A. M. Liveright* for Hillsdale Coal & Coke Company and Clark Brothers Coal Mining Company.

William A. Glasgow, Jr., and *John H. Hall* for W. F. Jacoby & Company.

H. W. Moore, George M. Roads, John H. Minds, William H. Patterson and *James H. Gleason* for Bulah Coal Company.

George V. Massey, Francis I. Gowen and *Murray & O'Loughlin* for defendant.

SUPPLEMENTAL REPORT OF THE COMMISSION.

HARLAN, *Commissioner:*

In Joynes v. P. R. R. Co., 17 I. C. C., 361, it was alleged that the defendant had given a preferred use of its terminal facilities in Pittsburgh to certain shippers of fruits and vegetables, in consequence of which the complainant had sustained loss by reason of the decay of certain of his shipments due to the delay in setting his cars at the unloading platform. We declined to make an award, three Commissioners dissenting, on the ground that this Commission was not authorized under the act to award damages of that character. The general principle announced was that money demands of that nature, arising out of discriminations ascertained and found by the Commission to have been practiced by an interstate carrier, are cognizable only in the courts and that our jurisdiction extends to what is there referred to as rate damages as distinguished from general damages of the kind demanded.

These complaints, in which the same defendant was charged with discrimination in the distribution of its coal-car equipment and in which general damages are alleged to have been sustained by the petitioners by reason of its unlawful practices in that regard, were then pending before the Commission. While they

were still under consideration and after our conclusions in Joynes v. P. R. R. Co., *supra*, had been announced, the Circuit Court of the United States for the Eastern District of Pennsylvania, in Morrisdale Coal Co. v. P. R. R. Co., 176 Fed. 748, dismissed an action for damages alleged to have been sustained by reason of the same rules and regulations of the Pennsylvania Railroad respecting the distribution of its coal cars as are involved in the cases now before us. The claim was based on discrimination, and the authority of the court has been invoked not only to determine that discrimination had been practiced by the defendant against the plaintiff but also to ascertain and enter judgment for the damages so sustained. The Court held that this Commission alone could entertain a complaint of that nature. See also Morrisdale Coal Co. v. P. R. R. Co., 183 Fed. 929.

It will be seen therefore that with respect to the principle announced in Joynes v. P. R. R. Co., *supra*, there is a conflict of view as between the Commission and the very court to which these complainants, if refused any relief here, would doubtless have to resort to secure a judgment for the damages here claimed to have been sustained. In order, therefore, to prevent a failure of justice in these cases, as well as to create an opportunity to secure a final ruling by the courts as to what should be our course of action in the future in such cases, we concluded to proceed with these claims; and having found that undue discriminations had been practiced by the defendant against the complainants, we ordered a reargument on the question of the amount of damages respectively sustained by them by reason thereof.

The history of the complaints, the issues raised by the pleadings, and our course in dealing with them, are fully explained in our previous reports herein. Hillsdale Coal & Coke Co. v. P. R. R. Co., 19 I. C. C. 356;

Jacoby & Co. v. P. R. R. Co., 19 I. C. C. 392; and Bulah Coal Co. v. P. R. R. Co., 20 I. C. C. 52. And therefore, in proceeding for the reasons explained to exercise jurisdiction to award damages, no statement of the facts need be made. It will suffice to refer to our reports in the cases cited. The record has now been carefully studied with a view to arriving at the amount of damages which each of the complainants is shown to have sustained, and we shall briefly announce our conclusions:

CLAIM OF THE HILLSDALE COMPANY.

We find that as a result of the discriminatory acts of the defendant the Hillsdale Coal & Coke Company was damaged in the sum of $27,193.01, which it is entitled to recover, with interest from May 9, 1907.

The original claim was for $127,855.65, which upon reargument was restated at $108,207.05, based on the assumption of a full car supply. A more conservative claim of $65,434.87 was also made in the brief on re-argument, based on an assumed output of 600 tons per day and what is claimed would have been a fair distribution of cars to this division of the defendant's lines and a fair share of these mines. Giving full weight to all that we find of record, however, we have been unable to find any clear basis for awarding this sum. Nor is there sufficient proof to enable us in this claim to make any finding with respect to the damages alleged to have been sustained by reason of the excess cost of mining the coal actually shipped to interstate destinations resulting from the irregular and inefficient working of the mine due to the failure of the defendant to furnish a regular and adequate supply of cars.

In arriving at our conclusion we have divided the time into two periods, the first from October 1, 1903, to March 31, 1906, after which the mines in this district

were closed down for several months as the result of a strike; and the second from August 1, 1906, to May 1, 1907. We find the following facts established by the complainant's proof, and have used them as factors in calculating the damages:

(*a*) That the complainant's mines, known as Hillsdale Nos. 2 and 3, during each of the two periods could have produced and disposed of an average of 500 tons of coal per working day; and that 22 working days would have been an average working month.

(*b*) That if the complainant had received its proper proportion of the cars available for distribution by the defendant it could have shipped and disposed of 143,880 tons during the first period and 67,795.20 during the second period; that it actually shipped during the two periods 45,059.84 tons and 35,719.25 tons, respectively, making a shortage in its output of 98,820.16 tons during the first period and 32,075.95 during the latter period; that of this tonnage 87,831.36 tons would have moved to points without the State of Pennsylvania during the earlier period and 15,662.68 during the latter period. In other words, we find that the quantity of coal which the complainant was prevented from selling and shipping to interstate destinations as the result of the discrimination against it in the matter of car supply was 87,831.36 tons and 15,662.68 tons for the periods named.

(*c*) That the average selling price for the coal at the mine for interstate markets would have been $1.0711 per ton during the first period and $1.1320 during the second period; that the cost of production during the same periods with its proper proportion of cars would have been 81 cents and 86 cents per ton, respectively; and that the profit lost on the shipments and sales which the complainant was prevented by the discriminatory acts in question from making during the

first period was 26.11 cents per ton and during the second period 27.2 cents.

We have attached no importance to the fact, but for a better understanding of the situation it may be well to state, that this complainant has recovered of the defendant a judgment in the sum of $17,500 in an action in the State courts similar to this proceeding but relating only to intrastate traffic. Hillsdale Coal & Coke Co. v. P. R. R. Co., 229 Pa. 61, 78 Atl. 28.

CLAIM OF JACOBY & COMPANY.

We find that by reason of the discriminations ascertained and set forth in our report in Jacoby v. P. R. R. Co., 19 I. C. C. 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907.

The claimants here demand $51,950.49. The award above made we base upon evidence adduced of record from which we find:

(*a*) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

(*b*) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days; and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138½ days.

(*c*) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

(*d*) That the average selling price of the complain-

ants' product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures the loss on the tonnage which the complainant was unable to ship.

(c) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049 per ton during the second period, making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based on a fair car supply as heretofore stated. This is the basis adopted for computing the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.

We further find that the complainants in the sale of their mine realized a profit of $7500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded.

Claim of Clark Brothers Company.

The discrimination practiced by the defendant against Clark Brothers Coal Mining Company is set forth in Jacoby v. P. R. R. Co., 19 I. C. C. 392. We now find that the damages sustained by this claimant as the result thereof amounted to $31,127.96, and that it is entitled to an award of reparation in that sum, with interest from June 25, 1907.

The amount of its claim as stated in the original

petition was $36,401.12. Our findings of fact, on which we arrive at this conclusion, are as follows:

(*a*) That the mines known as Falcon Nos. 2, 3 and 4 had an average output capacity of 600 tons, 120 tons, and 275 tons per working day, respectively, for the period of the action; and that 20 working days would have been an average working month.

(*b*) That dividing the time in question into two periods, one prior to March 31, 1906, and the other from August 1, 1906, to May 1, 1907, as we have done in the Hillsdale case, *supra*, the complainant could have disposed of and shipped 38,537.40 tons from Falcon No. 2 during the first period and 74,498.40 tons during the second period; that it actually shipped from that mine 11,812.76 tons and 21,326.18 tons in the respective periods, making a shortage in the output of 26,724.64 tons during the first period and 53,172.22 tons during the second period; and that of this tonnage it would have shipped and sold at interstate destinations 19,086.73 tons during the first period, and 35,109.61 tons during the second period.

(*c*) That from Falcon No. 3 the complainant could have shipped and sold 7707.48 tons during the first period and 14,899.68 during the second period, if it had received its proper share of equipment; that it actually shipped from this mine during those periods 1184.66 tons and 3018.90 tons, respectively, making its output 6522.82 tons during the first period and 11,880.78 during the second period less than it would have been with the proper car supply; and that of the figures last mentioned it would have shipped to points without the State of Pennsylvania 3866.72 tons and 6423.93 tons in the respective periods.

(*d*) That with its proper proportion of cars the mine known as Falcon No. 4 could have produced, sold, and shipped during the first period 12,210 tons and

during the second period 34,145.10 tons, whereas it actually was able to ship but 2306.12 tons and 11,105.45 tons; that it therefore shipped 9903.88 tons during the first period and during the second period 23,039.65 tons less than it would have sold and shipped with its proper proportion of the cars; and that of this shortage 9184.85 tons represents what would have been interstate business during the first period, and 8497.02 tons during the second period.

(*e*) That the average selling price of the coal mined at Falcon No. 2 during the first period was $1.289 per ton and during the second period $1.25 per ton; that the cost of production at that mine, based on a fair car supply, would have been 92 cents per ton and 96 cents per ton during the respective periods; that the average selling price of the coal from Falcon No. 3 was $1.20 during both periods and the cost of production 92 cents and 96 cents during the two periods; that the average selling price at Falcon No. 4 was $1.07 per ton during the first period and $1.132 per ton during the second period, and that the cost of production at that mine was 82 cents per ton and 86 cents per ton during the respective periods. The profit that would have accrued on the output of the respective mines was therefore as follows: Falcon No. 2, 36.9 cents and 29 cents; Falcon No. 3, 28 cents and 24 cents; and Falcon No. 4, 25 cents and 27.2 cents per ton. This measures the loss on the tonnage which the complainants were unable to ship.

(*f*) That the actual cost of production is shown by the record as $1.1419 per ton during the first period and $1.2063 per ton during the second period at Falcon No. 2; that the actual cost at Falcon No. 3 was $1.166 per ton during the first period and $1.311 per ton during the second period; that the actual cost at Falcon No. 4 was $1.017 and 90 cents during the re-

spective periods; and that the excess over the cost of production, as shown in the preceding paragraph herein, resulting from the irregular car supply, was 22.19 and 24.63 cents per ton, respectively, at Falcon No. 2; 24.6 and 35.1 at Falcon No. 3; and 19.7 and 4 cents for the respective periods at Falcon No. 4. This is the measure we have used in arriving at the loss sustained by these complainants in increased cost of producing the coal actually sold and shipped to interstate points during the period in question.

CLAIM OF BULAH COAL COMPANY.

Following our conclusion in Bulah Coal Co. v. P. R. R. Co., 20 I. C. C. 52, that the defendant had unlawfully discriminated against these complainants, we now assess the damages resulting therefrom at $50,307.05, with interest from June 28, 1907.

The reparation prayed for by the complainants aggregates $155,401.59. In our previous report we took April 12, 1904, as the date for dividing the period of the action. Upon further reflection October 1, 1904, seems more proper, that being the date of the formation of the new co-partnership. In arriving at the foregoing amount of reparation we have therefore considered the matter in two periods, one prior and the other subsequent to that date, and make the following findings:

(*a*) That the fair rating of the mine, fixed by the defendant without objection by the complainants, was 560 tons during both of the periods referred to.

(*b*) That 22 working days would in this case have been an average working month, although it is alleged that the mine could have been worked 26 days per month.

(*c*) That if the complainants had received their proper proportion of the cars available for distribution

they could have mined, sold and shipped 120,415.68 tons during the first period and 214,257.12 tons during the second period; that they actually shipped during the two periods 110,892 and 143,000 tons respectively, making a shortage in their output of 9523.68 tons in the first period and 71,257.12 tons for the second period; and that of this tonnage 3878.04 tons during the first period and 48,540.34 tons during the second period would have moved to and have been sold at interstate destinations.

(*d*) That the average profit on orders received by the complainants for points without the State of Pennsylvania, and which were canceled and unfilled as the result of lack of their fair proportion of available equipment, would have been 71.8 cents per ton during the first period and 25.2 cents per ton during the latter period. This measures the complainants' loss on the coal which they were unable to ship during the period of the action, and the damages allowed on this ground aggregate $15,016.60.

(*e*) That the cost of production at the complainants' mines during the first period was $1.23 per ton on the average, and during the second period $1.08; that the cost of production would have been 88 cents per ton during both periods if a non-discriminatory share of the car supply had been received; and that the excess in the actual cost of production of the coal mined and shipped to interstate destinations resulting from the discrimination in car supply was therefore 35 cents per ton during the first period and 20 cents during the second period. This is the measure of the complainants' damages in the excess cost of production on the coal actually sold and shipped to points outside the State of Pennsylvania during the period of the action; and the damages awarded on that ground aggregates $35,290.45.

In cases of this kind there is a natural tendency on one side to enlarge and on the other to minimize the claim made. This is characteristic of the record before us. Damages are claimed by the petitioners to an extent not supported by the evidence adduced; on the other hand, the defendant has not sought so much to help the Commission to arrive at a correct award as to show the fallacious character of the factors adopted by the complainants in arriving at their estimates of their damages. The result is a record that is not so helpful as it might be. The responsibility for this, however, rests with the parties; in such a case we can accept only the responsibilty that follows upon a careful study of the record and an earnest effort to weigh all the evidence before us and to reach such conclusions as it fairly justifies.

Many theories as to the elements that should be considered in estimating damages in a case of this kind were advanced by each side. It is said by the complainants that their damages should be estimated on the basis of a supply of coal cars according to the physical capacity of their mines, or at least on the basis of their rated capacity. We have dealt with the claims only on the basis of the fair proportion of the available equipment that each claimant was entitled to receive in view of what we here find would have been a proper rating for each operation. According to the argument and brief on behalf of the defendant there is no sound theory upon which the damages of the complainants may be calculated. The defendant contends in all these cases that the coal which the complainants were unable to mine because of their failure to obtain their fair share of cars still remained in the ground, and that the extent of the damage really suffered can not therefore be ascertained without proof, showing that the coal when subsequently mined was sold at a less profit

than might have been realized during the period of the action. We are not prepared to enter upon a discussion of that question. Such claims are clearly justifiable, and we know of no better guide or basis for our action than the rule followed by the courts in similar cases. In the action by the Hillsdale Coal & Coke Company in the State courts, to which reference has heretofore been made, the Supreme Court of Pennsylvania, in 229 Pa. 261; 78 Atl. 28, said:

> "As we look at it, the only known method to get at data from which to estimate what a man is damaged by reason of discrimination, in not furnishing cars or other facilities of transportation, is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from that mine. . . . Counsel for appellant argued that because, as a result of the defendant's discrimination, the coal of the plaintiff was left in the ground, and might be available for future shipment, and as there was no evidence that prices which prevailed throughout the period of the action were abnormal, or in excess of those reasonably ruling, there was no room for the inference that the plaintiff would realize for his coal when it might be shipped in the future less than it would have realized if shipped during the period of the action. But the burden was upon the defendant to show anything of this kind, by way of mitigation of damages, if it could do so, and it offered no evidence for any such purpose."

We do not undertake to say whether this is a correct rule, but simply refer to the case in explanation of our findings.

Orders will be entered in accordance with these conclusions.

SUPPLEMENTAL ORDERS.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 11th day of March, A. D. 1912.

No. 1063.

HILLSDALE COAL & COKE COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19, I. C. C. 356, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainant, Hillsdale Coal & Coke Company, on or before the 1st day of June, 1912, the sum of $27,193.01, with interest thereon at the rate of 6 per cent. per annum from May 9, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involving having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C. 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted

by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainants, Clark Brothers Coal Mining Company, on or before the 1st day of June, 1912, the sum of $31,127.96, with interest thereon at the rate of 6 per cent. per annum from June 25, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1136.

JAMES H. MINDS AND JULIA A. MATZ, TRADING AS THE BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainants, James H. Minds and Julia A. Matz, trading as The Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $31,715.57, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1137.

JAMES H. MINDS, SURVIVING AND LIQUIDATING PARTNER OF JAMES H. MINDS AND WILLIAM J. MATZ, LATELY TRADING AS THE BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainant, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company, on or be-

fore the 1st day of June, 1912, the sum of $18,591.48, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

By the Commission.

JOHN H. MARBLE,
Secretary.

(Seal)

"EXHIBIT B."

Opinion No. 1384.

BEFORE THE

INTERSTATE COMMERCE COMMISSION.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

Decided March 7, 1910.

REPORT OF THE COMMISSION.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

Submitted January 30, 1909. Decided March 7, 1910.

1. The special allotment daily of 500 of its system coal cars to a particular operator for the purpose of supplying foreign steamships with coal found to be a discriminatory practice so long as they were not counted against the rating of those mines during periods of car shortage. A like view expressed of the sale by the defendant of 1,000 of its coal cars to the same operator.
2. Following Hillsdale Coal & Coke Co. v. P. R. R. Co., ante, p. 356, defendant's rules and regulations for the distribution of coal cars during periods of car shortage found to be unlawful.

Harry Boulton, John H. Minds, William A. Glasgow, Jr., and John William Hallahan, 3rd, for W. F. Jacoby & Company.

David L. Krebs for Clark Brothers Coal Mining Company.

Francis I. Gowen and *George V. Massey* for defendant.

REPORT OF THE COMMISSION.

HARLAN, *Commissioner:*

The mines of the complainant in Hillsdale Coal & Coke Co. v. P. R. R. Co., just disposed of (ante, p. 356), are located near the town of Glen Campbell, in Indiana County in the State of Pennsylvania, on the Cush Creek branch of that part of the defendant's Cambria

and Clearfield Division which extends northward from Cresson; and the chief competitor of that complainant has been D. E. Williams & Company, whose mines are in that district. In the above-entitled complaints the mines are in another mining district in the bituminous coal regions of Pennsylvania and on another part of the Cambria and Clearfield division of the defendant. They are located about nine miles west of Osceola Mills, in or near the town of Smoke Run, in Clearfield County, on what is known as the defendant's Moshannon branch, which, at Osceola Mills, joins its so-called Tyrone division extending northward from its junction with the main line at Tyrone. Since October, 1905, the Clark Brothers Coal & Mining Company has operated, under leases, three mines known as Falcon No. 2, No. 3, and No. 4. The largest and best equipped of these mines known as Falcon No. 2, was operated prior to that time by the petitioner, W. F. Jacoby & Company, which had taken over the lease of the mine in April, 1904.

It is Falcon No. 2, and the period from April, 1904, to October, 1905, that are involved in the first of the above-entitled complaints. That mine is said to be one of the best equipped collieries in the district, and on April 1, 1904, had an inventory valuation of $30,000. It is provided with an underground electric system for hauling its mine cars and with a first class wooden tipple and a patent dump; it is also well supplied with mine cars and has ample switch-track facilities; and its grades favor the out movement of loaded mine cars. There are said to be from 175 to 200 acres of solid coal in the three Falcon mines, varying in thickness from 2½ to 5 feet; and in No. 2 mine there were, in 1904, about 100 acres of coal remaining, some 30 acres having been mined prior to that time. The coal is accepted as a superior grade of steaming coal that is readily marketed in New England, New Jersey,

New York and Pennsylvania, being shipped all rail over the defendant's lines to those points and also to tidewater.

It is not contended that there was any unfairness in the rating assigned to Falcon No. 2 during the period from April, 1904, to October, 1905, when it was being operated by the complainant, W. F. Jacoby & Company. The rating then given to it was 450 tons a day, and this the complainant in that case admits was a close approximation of its actual output capacity. It appears, however, that from October, 1905 to May, 1907, when Falcon No. 2 was being operated by the Clark Brothers Coal & Mining Company the rated capacity credited to the three Falcon mines was 9 cars or 315 tons for No. 2, 1 car or 35 net tons for No. 3, and 2 cars of 70 net tons for No. 4, making a total capacity of 12 cars or 420 tons for the three mines. In April, 1907, these ratings were increased to 13 cars or 455 tons for Falcon No. 2, 2 cars or 70 tons for Falcon No. 3, and 5 cars or 175 tons for Falcon No. 4, making an aggregate capacity assigned to the three mines of 20 cars or 700 tons daily. The complainant in the second of these complaints, in support of the theory, advanced also in the Hillsdale Coal & Coke Co. v. P. R. R. Co., ante, that commercial capacity ought to be eliminated, calls attention to the fact that the defendant in its answer admits that during the period in question the actual physical capacity of the three Falcon mines was 709 tons, 144 tons, and 270 tons, respectively, or a total of 1133 tons in all, which would require 31.1 cars daily to move. On the other hand it is to be noted that the petitioner in the second complaint contends that the physical capacity of the three mines was only 600 tons, 125 tons, and 300 tons, respectively, or 1025 tons in the aggregate per day. Finally it must be observed that neither of the petitioners made complaint to the defendant, at that time, of the ratings of these mines, and when

ually they did complain the defendant accepted their gineer's statement or estimate as to their actual orking capacity. Under these circumstances, we see substantial basis for any finding of discrimination gainst the complainants with respect to the defend-nt's ratings of their mines.

The damages sought to be recovered in the first of ese complaints amount to $51,950.49 and in the sec-nd complaint to $36,901.13. Falcon No. 2 was pur-hased from the Penn Collieries Company, in which . F. Jacoby seems to have been interested. The ansaction appears of record as a purchase, but it ay have been a mere change of ownership on the basis nominal values. Nevertheless, the record shows a rchase price of $25,000 and that W. F. Jacoby & ompany retained the mine until October, 1905, when ey sold it for $32,500, or for $7,500 more than they id for it. In the meantime they had mined 55,000 ns of coal and sold it apparently at a profit of about cents a ton. Whether the mine could have been ld so well if more coal had been taken out of it by the mplainant is a question as to which it is difficult to rrive at any satisfactory conclusion. It is to be noted, owever, that the complainant claims to have had ac-al orders for a substantial portion of the output pacity of Falcon No. 2.

As we understand these cases, the substantial oints upon which discrimination may be predicated re as follows:

There are a number of mines on the Moshannon ranch of the defendant that are owned by other oper-tors, but in this connection it will suffice to mention nly the six mines operated by or for the Berwind-hite Coal Mining Company, one of which, known as ureka No. 27, immediately adjoins the complainant's alcon No. 2. The same "D" coal vein is worked in ese two mines. The quality of the coal is therefore

the same and it is claimed that the capacities of the two mines were substantially the same at the period involved in the first of these two complaints. Falcon No. 2 is said in fact to have been better equipped, and if this was the case it would seem to have had an advantage over its neighbor if it had been placed on an equal footing in the matter of car supply.

But neither Falcon No. 2 nor the mines of the complainant, the Clark Brothers Coal & Mining Company, was placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of the distribution of the defendant's available coal-car equipment during the period of the actions.

During the years 1902, 1903 and 1904 the employees of the defendant that were in charge of the distribution of coal-car equipment had special orders for giving to the Berwind-White Coal Mining Company a special allotment of 500 cars daily. That company had contracts for supplying coal for certain steamships sailing from New York Harbor. Complaint had been made that these steamers were frequently delayed because of a lack of coal, and the defendant felt that it was warranted in making that special arrangement with the coal mines that had undertaken to supply them with fuel. This preference was the occasion of comment by the Commission in its report in the coal and oil investigation. Few, if any, of these specially assigned cars reached the Berwind-White mines in this particular mining district, and therefore it is difficult to determine to just what extent these complainants were prejudiced by that preference of a competing companys' operations in another district; nevertheless, it was inequitable in principle and undoubtedly so to some extent at least in its results, and we see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference of one company and district and an un-

due discrimination against coal operations in another district.

Another point also mentioned in our report in the coal and oil investigation just referred to is that 1,000 of the defendant's own system coal cars were sold by the defendant to and were thus made available by the Berwind-White Company. The defendant to that extent diminished its capacity to supply the coal-car requirements of other coal operations upon its lines. While the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will not be considered in this report, the least that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors.

It is established with reasonable clearness on the record that the Berwind-White mines during the years 1906 and 1907, as well as to a period immediately preceding those dates, were daily in receipt of coal cars in large numbers and were therefore kept in operation almost continuously while the complainants received an inadequate supply and were not able, therefore, to run their mines to the best advantage. This difference is largely explained by the fact that the Berwind-White Coal Mining Company owned a large number of private cars and also enjoyed contracts for supplying the defendant and its connection with coal. Under the rules of defendant, fully explained in Hillsdale Coal & Coke Co. v. P. R. R. Co., ante, the ownership of such private cars and the enjoyment of these contracts resulted in the special allotment to the mines of that company of these so-called assigned cars. For the reasons explained at some length in that case those rules operated as an undue discrimination against these complainants, and we so find. But for the present and for the reasons there explained we shall limit our order to

a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby.

An order will be entered in accordance with these conclusions.

ORDERS.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of March, A. D. 1910.

Present:

Martin A. Knapp,
Judson C. Clements,
Charles A. Prouty,
Francis M. Cockrell,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
Commissioners.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

These cases being at issue upon complaints and answers on file, and having been duly heard and sub-

mitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated and is in violation of the third section of the Act to Regulate Commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required, on or before the 1st day of November, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

And it is further ordered, That the question of the damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises.

ORDER OF COURT.
(Filed July 19, 1912.)

Before McPherson, *J.*

And Now, July 19, 1912, the petition of W. F. Jacoby and Isaac C. Weber, co-partners, trading under the firm name of W. F. Jacoby & Company, in the above proceeding having been filed and the averments thereof considered, it is ordered that the Pennsylvania Railroad Company be and are hereby directed and ruled to file a plea, answer or demurrer to said petition within thirty days of the service of a copy of said petition together with a copy of this order, or judgment sec leg.

BY THE COURT.

Attest:
Henry B. Robb,
Deputy Clerk.

PLEA.
(Filed Nov. 16, 1912.)

Defendant in the above pleads "Not Guilty."

JOHN G. JOHNSON,
Attorney for said Defendant.

Nov. 16, 1912.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

June Term, 1912. No. 2008.

Isaac C. Weber, Surviving Partner of W. F. Jacoby and Isaac C. Weber, co-partners, trading under the Firm Name of W. F. Jacoby & Company,

v.

Pennsylvania Railroad Company.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That in the said term of June, A. D. 1912, came the said plaintiff into the said Court, and impleaded the said defendant in a certain plea of trespass, etc., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of the said Court, held at the District aforesaid before the Honorable J. Whitaker Thompson, Judge of the said Court, the twenty-fourth day of October, A. D. 1919, the aforesaid issue between the said parties came to be tried by a jury of the said District for that purpose duly empanelled (prout list of jurors), at which day came as well the said plaintiff as the said defendant by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue, being also called came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said defendant did except to the rulings of the Court as herein appears.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

June Term, 1912. No. 2008.

Isaac C. Weber, Surviving Partner of W. F. Jacoby and Isaac C. Weber, co-partners, trading under the Firm Name of W. F. Jacoby & Company,

v.

Pennsylvania Railroad Company.

Before HON. J. WHITAKER THOMPSON, *J.*, and a Jury.
Philadelphia, Pa., Friday, October 24, 1919.

Present: WILLIAM A. GLASGOW, JR., ESQ., representing the plaintiff;
FRANCIS I. GOWEN, ESQ., representing the defendant.

Transcript of Testimony, Charge of the Court, Rulings of the Court, and Exceptions.

Jurors sworn and affirmed Friday, October 24, 1919.

Mr. Glasgow opened the case to the jury on behalf of the plaintiff.

Mr. Gowen opened the case to the jury on behalf of the defendant.

PLAINTIFF'S EVIDENCE.

MR. GLASGOW: If your Honor please, I offer in evidence the report of the Interstate Commerce Commission of March 7, 1910, to be found in the reports of the Interstate Commerce Commission I. C. C., Volume 19, at page 392.

The petitioner is W. F. Jacoby and I. C. Weber, trading as W. F. Jacoby & Company, v. Pennsylvania Railroad Company, No. 1139, submitted January 30, 1909, decided March 7, 1910. After stating the syllabus of the case and the names of the counsel, the report of the Commission is as follows:

"REPORT OF THE COMMISSION.

HARLAN, *Commissioner:*

The mines of the complainant in Hillsdale Coal & Coke Company v. P. R. R. Co., just disposed of"—I will state that that is another case.

MR. GOWEN: I do not want to make any technical objections, but I think we are entitled, if your Honor please, to offer the record of the case, if he is going to read from the record.

MR. GLASGOW: I want to be perfectly fair in the matter. I will offer the record.

MR. GOWEN: The entire record?

MR. GLASGOW: Yes.

FRANK C. STRATTON, having been duly sworn, was examined and testified as follows:

By MR. GLASGOW:

Q. Where do you reside?

A. Washington.

Q. You are employed by the Interstate Commerce Commission?

A. Yes, sir.

Q. In what capacity?

A. Chief, Docket Bureau.

Q. Have you with you the original record in the case of W. F. Jacoby & Company against the Pennsylvania Railroad Company, No. 1139?

A. Yes, sir.

Q. Is this the document?
A. This is the record, yes, sir.
Q. Is that the complete record?
A. That is the complete record, yes, sir.

Mr. Glasgow: If your Honor please, I offer it in evidence—the complete record. The petition I will not read unless Mr. Gowen wants it read.

Mr. Gowen: There will be a question, of course, if your Honor please, as to what basis is found in this record for the award of the Commission. Now I do not think either of us wants to encumber the whole record of this case on this record, and it seems to me that it would be advisable and tend to expedite matters and really to greater clearness if the record should be admitted, and we should be asked by the Court to indicate what parts of the record we rely upon in support of our several contentions. Otherwise, I do not see how, if we ask your Honor to charge that there is no foundation, no basis in this record for the award of the Commission—we are going to impose a very considerable burden on you to go on through the entire record.

The Court: Cannot counsel agree on what part of the record should go down on the notes?

Mr. Gowen: I think we ought to do that.

Mr. Glasgow: I will want to offer in evidence and of course read to the jury the evidence that was taken before the Commission. It is perfectly clear—Mr. Gowen is relying upon one of the exhibits that is before the Commission. That exhibit is based upon evidence, and the purpose of it is clear. I propose to read to the jury the evidence before the Commission under which they may be able to understand the exhibit. That is what I propose in this record to present. I do

not propose to read the petition that was filed before the Commission, nor do I propose to read the arguments that were taken down there, or anything of that kind.

MR. GOWEN: I understand from that that Mr. Glasgow will read to the jury, and therefore get on the record in this case, the evidence which he believes substantiates that statement.

MR. GLASGOW: I intend to read all of the evidence, sir, which I think substantiates the right of the plaintiff to damages.

THE COURT: That is all need be determined just at this time, I presume.

By MR. GLASGOW:

Q. Mr. Stratton, I hand you a volume and ask you what that is?

A. Volume 8 of the testimony taken before the Interstate Commerce Commission in the coal and oil investigation.

Q. This is the original volume of the records of the Commission?

A. This is the original volume of the Commission, yes, sir.

MR. GLASGOW: In that coal and oil investigation I desire to offer the evidence of Mr. J. B. Hutchinson, who at that time was the general manager of the Pennsylvania Railroad Company.

MR. GOWEN: I object to that. That was an investigation conducted by the Commission under an Act of Congress. It is not a judicial proceeding. The testimony there is not admissible in this case.

MR. GLASGOW: The plaintiff could certainly show the admissions of Mr. Hutchinson, whether they were made before the Commission, or where they were made. This is his testimony as to the

car distribution in that very territory during this period, and I think I am entitled to show it.

THE COURT: This was given in a hearing before the Interstate Commerce Commission?

MR. GLASGOW: Yes, sir.

THE COURT: What was Mr. Hutchinson's relation to the defendant?

MR. GLASGOW: General manager of the Pennsylvania Railroad Company and an officer of that company, the defendant here.

THE COURT: Why is not that evidence, Mr. Gowen?

MR. GOWEN: In the first place, Mr. Hutchinson, if they want him as a witness, is available.

MR. GLASGOW: I know he is.

MR. GOWEN: Secondly, they cannot put in evidence testimony that was given before a Congressional committee.

THE COURT: Mr. Gowen, if the plaintiff were able to produce any admission by the defendant relating to the distribution of cars during the time in controversy at any time or place, why would not that be admissible?

MR. GOWEN: In support of the award of the Commission made without that testimony before it?

MR. GLASGOW: It is before it.

THE COURT: As I understand it, it is not offered in support of the finding of the Commission, but it is offered in support of the plaintiff's case here. As I understand it, the plaintiff is offering the report of the Commission as prima facie evidence, but it is open to them to produce other evidence in addition to that.

MR. GOWEN: It seems to me that testimony

taken in that way is certainly not admissible here in this case.

THE COURT: This is the official record of the Interstate Commerce Commission, is it?

MR. GLASGOW: This is the official record of the Interstate Commerce Commission, is it?

MR. GLASGOW: This is the official record of the Interstate Commerce Commission.

By MR. GLASGOW:

Q. This is the official record of the Interstate Commerce Commission?

A. Yes, sir.

THE COURT: You only object to it, Mr. Gowen, on the ground that it was taken in another proceeding which was not a judicial proceeding. Is that the ground of your objection?

MR. GOWEN: Yes, sir.

THE COURT: I will overrule your objection and grant you an exception.

(Objection overruled.)

(Exception noted for the defendant, by direction of the Court.)

(Mr. Glasgow read the testimony of W. F. Jacoby, taken before the Interstate Commerce Commission, as follows):

W. F. JACOBY, called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Glasgow: Where do you live?

Mr. Jacoby: Ambler, Pennsylvania.

Mr. Glasgow: Are you a member of the firm of W. F. Jacoby & Company?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Who are the members of that firm?

Mr. Jacoby: W. F. Jacoby and I. C. Weber.

Mr. Glasgow: I might say that this petition charges, or the discrimination complained of in the petition, is from April 1, 1903, to October 18, 1905. That is a mistake and should be corrected to make it read from April 1, 1904, to October 18, 1905. There is a year there that we tried, as soon as we found out yesterday, to correct, and indicated it to the other side.

Examiner Brown: That correction will be noted.

Mr. Glasgow: It eliminates a year. From April 1st, 1904, to October 18th, 1905, were you engaged, or your firm engaged in the operation of a coal mine in Clearfield County?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: What was the name of that mine or mines?

Mr. Jacoby: Falcon No. 2.

Mr. Glasgow: There was only one mine, was there?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: That was situated in Bigler Township, Clearfield County, as charged in the petition?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: What was the quality of the coal you were mining at that place?

Mr. Jacoby: It was the Moshannon, a very high grade coal.

Mr. Glasgow: The Moshannon seam?

Mr. Jacoby: Yes, sir, it was in good shape, and quality of a very high grade.

Mr. Glasgow: On what railroad was the mine situated?

Mr. Jacoby: On the Tyrone division of the Pennsylvania Railroad.

Mr. Glasgow: Did you have any other means of shipment except over the Pennsylvania Railroad?

Mr. Jacoby: No, sir.

Mr. Brown: Will you describe the location of your mine?

Mr. Glasgow: I was coming to that.

(A map was here produced by Mr. Glasgow, and submitted to Examiner Brown.)

Mr. Glasgow: Where is Tyrone?

Mr. Jacoby: Tyrone would be down here (indicating); it is not in Clearfield County. Here is Tyrone (indicating). Here is the main line of the Tyrone division, and at Osceola, and it goes to Smoke Run, at which point Falcon No. 2 Mine is located.

Mr. Glasgow: At Smoke Run you say is where Falcon No. 2 is located?

Mr. Jacoby: Yes, sir; it is not far from the station.

Mr. Glasgow: Then it is on the Moshannon branch of the line running from Tyrone up to Clearfield?

Mr. Jacoby: Yes, sir.

Examiner Brown: How far from Osceola?

Mr. Jacoby: I thing it is about nine miles from Osceola Mills to Falcon No. 2.

Mr. Glasgow: How far is it from Tyrone to Osceola Mills?

Mr. Jacoby: About twenty miles, I think. These numbers on here represent the location of various mines, and there is an index to this map. For instance, Falcon No. 2 is 62.

Examiner Brown: Then the Moshannon branch extends further on?

Mr. Jacoby: It goes to McCartney; yes, sir, five or six miles further.

Mr. Glasgow: How long had that mine been in operation prior to the first of April, 1904; I mean Falcon No. 2?

Mr. Jacoby: I opened the mine, I think, in September, 1900.

Mr. Glasgow: And you were operating it April 1, 1904, as lessee?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: From whom, who was the owner of the mine?

Mr. Jacoby: I bought that mine from the Penn Collieries Company.

Mr. Glasgow: In 1900?

Mr. Jacoby: In April, 1904. Prior to that time the said Penn Collieries Company owned by a group of mines of which that was one, and I was vice-president of the Penn Collieries Company at that time.

Mr. Glasgow: It was owned by the Penn Collieries Company, and your firm had a lease of it?

Mr. Jacoby: No, I bought it from the Penn Collieries Company.

Mr. Glasgow: Well, you were operating it as lessee, were you?

Mr. Jacoby: Yes.

Mr. Glasgow: Under a lease?

Mr. Jacoby: Yes.

Mr. Glasgow: From whom was the lease?

Mr. Jacoby: From Root and Bloom; it was an estate; I forget the estate—the John M. Jordan estate was the lessor.

Mr. Glasgow: You leased it from them?

Mr. Jacoby: Yes.

Mr. Glasgow: How did they get it; did they own the fee?

Mr. Jacoby: Yes, they owned the land.

Mr. Glasgow: W. F. Jacoby & Company were the lessees of the Jordan estate?

Mr. Jacoby: Yes.

Mr. Glasgow: How long had you been operating it under that lease?

Mr. Jacoby: As W. F. Jacoby & Company?

Mr. Glasgow: Yes.

Mr. Jacoby: From April 1, 1904, to October 18, 905.

Mr. Glasgow: Your lease began in 1904?

Mr. Jacoby: Yes.

Mr. Glasgow: Have you that lease with you?

Mr. Jacoby: The lease was turned over to Clark rothers & Jacoby, on October 18, 1905, together with e title papers that passed at that time.

Mr. Glasgow: Will you give a general description how that mine was equipped?

Mr. Jacoby: It was equipped with electric haul-e, and it was considered one of the best equipped ines of its size on the Tyrone division.

Mr. Glasgow: What was the thickness of the vein?

Mr. Jacoby: From three feet to three and a half et.

Mr. Glasgow: How was the drain in the mine, in e hauling?

Mr. Jacoby: The mine was in most excellent con-tion. It was self-draining, and was opened in such way that it made a very desirable proposition.

Mr. Glasgow: You mean it drained towards the outh of the mine?

Mr. Jacoby: Yes.

Mr. Glasgow: Then the grade was in favor of the ul coming out with coal?

Mr. Jacoby: Always; yes, sir.

Mr. Glasgow: Can you tell how it was equipped? d you have a tipple there?

Mr. Jacoby: I had a first class tipple there, a ooden structure equipped with a Phillips patent dump, hich was capable of handling 1000 tons of coal a day it was necessary.

Mr. Glasgow: How many mine cars did you have?

Mr. Jacoby: I think we had a hundred and twenty-five.

Mr. Glasgow: What was the capacity of those mine cars?

Mr. Jacoby: I think about a ton and a half.

Mr. Glasgow: Was the mine located on a siding of the Pennsylvania Railroad?

Mr. Jacoby: Yes, the siding came off of the main line of the Moshannon branch, and was put in partly by the Pennsylvania Railroad at the time the mine was opened. We paid them, I think, $2500 for putting in that siding.

Mr. Glasgow: How many working places did you have in April, 1904?

Mr. Jacoby: I could not tell you that accurately, Mr. Glasgow, without going over the maps. I think our superintendent could perhaps answer that question more accurately.

Mr. Glasgow: Do you know what was the capacity of that mine for furnishing coal for shipment per day on April 1, 1904?

Mr. Jacoby: Yes. On April 1, 1904, I believe we could have shipped 450 tons of coal a day. Of course there is this to be considered: In times prior to that the mine was very much disabled by irregularity in car supply, and disorganized so that if on a particular day we were called upon to take out 450 to 500 tons a day, perhaps it would have given us a little trouble on account of our men; but if we had been given a week or ten days' or two weeks' time, there is no doubt in my mind that we could have taken out 450 or perhaps 500 tons a day.

Mr. Glasgow: You mean by reason of the irregularity of the service theretofore you would have had to have gotten your men together?

Mr. Jacoby: Yes, sir; we were always disorgan-

ized on account of the car supply more or less. We never could get up to capacity.

Mr. Glasgow: How far was your tipple from the mouth of the mine?

Mr. Jacoby: The distance from the drift mouth was 1600 feet, with the grade in favor of the loads.

Mr. Glasgow: Did they run by gravity to the tipple?

Mr. Jacoby: Well, we could run by gravity to the tipple, but we took the motor down ahead of the trip in order to bring the empties back.

Mr. Glasgow: Was the equipment of that mine in good condition on April 1, 1904; in good repair?

Mr. Jacoby: Excellent; it could not have been better. It was always kept that way.

Mr. Glasgow: How much was the value of that equipment, plant and property?

Mr. Jacoby: I have valued it at $30,000 and afterwards sold it for more money than that, so that my valuation was conservative.

Mr. Glasgow: You sold only the equipment and your rights under the lease, I suppose, the plant?

Mr. Jacoby: I sold the equipment and the right of lease, good will—in fact, good will and fixtures.

Mr. Glasgow: The coal that you mined at that property in April 1, 1904, and October 18, 1905, where was your market for it?

Mr. Jacoby: I could have marketed it, and did market a large portion of it to interstate points: that is, to New England; large portions of it went to New England, and to New Jersey, Maryland and various other places; in fact, every pound of it, if we had had enough of it, could have been——

Mr. Glasgow: Were you shipping to points outside of the State of Pennsylvania?

Mr. Jacoby: Yes, always.

Mr. Glasgow: Did you ship any of the coal to tidewater, or all rail?

Mr. Jacoby: Both.

Mr. Glasgow: Both ways?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Is that branch railroad you speak of, the Moshannon branch, operated by the Pennsylvania Railroad Company?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: How many men were you employing there on the first of April, 1904, if you can tell me?

Mr. Jacoby: My recollection is that we had about 120 men on April 1, 1904.

Examiner Brown: That was including men of all kinds; miners, haulers, loaders, etc?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: During the time from the first of April, 1904, to October 18, 1905, did you have any difficulty in marketing coal that you raised at the Falcon No. 2 mine?

Mr. Jacoby: No, sir, we never had enough of it to meet our requirements; we had lots of trouble with our buyers because we could not keep them going.

Mr. Glasgow: Were you able during that period to have filled, dumped and consigned the coal up to the capacity of your mine if you had had the cars?

Mr. Jacoby: Absolutely.

Mr. Glasgow: I asked you whether the markets which you shipped to were outside the State of Pennsylvania, in other states?

Mr. Jacoby: They were; yes, sir.

Mr. Glasgow: Had your mine been rated by the Pennsylvania Railroad for coal cars distribution, rated as to its capacity?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: On April 1, 1904, what was the rat-

ing that the Pennsylvania Railroad Company gave to your mine?

Mr. Jacoby: I understood it to be 450 gross tons.

Mr. Glasgow: Per day?

Mr. Jacoby: A day.

Mr. Glasgow: Have you got an inventory of the equipment that you had at that mine?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Where is it?

Mr. Jacoby: It also went with the title papers of the transfer, and is now in the hands of Clark Brothers Coal Mining Company. Mr. Rettew has the papers.

(The paper was produced.)

Mr. Glasgow: I would like to get the witness to identify this so that I can offer it hereafter, if I want to. It is an itemized statement of their equipment. I hand you herewith a statement headed "Inventory Falcon No. 2 Mine," and ask you if that is a correct inventory of the equipment of the mine on April 1, 1904?

Mr. Jacoby: Yes, sir, that seems to be the inventory.

Mr. Glasgow: We will have a copy made of this and have it filed, if you will permit us to do so.

(The paper was received in evidence and marked "Complainant's Exhibit No. 1, attached to Mr. Jacoby's Testimony.")

Mr. Glasgow: We asked for the distribution sheets of that division.

Mr. Gowen: Yes, sir, they are here. Do you want them now?

Mr. Glasgow: I suppose we will go along as far as we can, and then we will have some little time to examine those sheets. I think, probably, Mr. Gowen, if we could have an opportunity to go over those sheets we could probably have an opportunity to get up a

statement that we could probably agree as to what the sheets embraced, without requiring all of them to be presented here in evidence.

Mr. Gowen: Do not ask us to make any statements, though. They are here if you want to make any statements.

Mr. Glasgow: No, I realize you have been in the business some time; but what I meant was that if we could get up a statement you would probably agree to it.

Mr. Gowen: Do you want them now?

Mr. Glasgow: I do not think I will take that up at this time. Have you got the statement, or have you had a statement prepared, Mr. Jacoby, showing the number of cars which were furnished to your mine from April 1, 1904, to October 15, 1905?

Mr. Jacoby: Yes, sir, I have had such a paper prepared.

Mr. Glasgow: (Handing paper) I ask you if this is that statement?

Mr. Jacoby: Yes, that is the statement.

Mr. Glasgow: I offer this in evidence.

(The paper was received in evidence and marked "Complainant's Exhibit No. 2, Attached to Mr. Jacoby's Testimony.")

Mr. Glasgow: If your Honor please, that exhibit ("Complainant's Exhibit No. 2") shows the cars that were furnished to Falcon No. 2 from April 1, 1904, to October 15, 1905. The first year, 1237 cars, and up to October in the next year, 541. That is "Exhibit No. 2."

(Mr. Glasgow continued the reading of the testimony, as follows):

"Mr. Glasgow: This statement, Mr. Jacoby, sets forth correctly the total number of cars which you re-

ceived for shipping coal during the period from April 1, 1904, to April 1, 1905, and from April 1, 1905, to October 15, 1905, showing the division of the total as to foreign cars and Pennsylvania Railroad cars?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And as between wooden cars and steel cars: is that correct?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: I find that we have not carbon copies of some of these statements. We will have them made and then withdraw them. We will furnish copies to Mr. Gowen.

Examiner Brown: That will be all right.

Mr. Glasgow: Did you have made up a statement of the average cost of mining coal from April 1, 1904, to April 1, 1905?

Mr. Jacoby: Yes, sir, we made up a monthly statement, and those are the statements of the cost of production.

Mr. Glasgow: Did you also have a statement made up of the cost of mining coal at Falcon No. 2 mine, from April 1, 1905, to October 15, 1905?

Mr. Jacoby: Yes, on the same basis.

Mr. Glasgow: Each statement is made up monthly, is it?

Mr. Jacoby: Monthly, and then a yearly statement showing the average cost.

Mr. Glasgow: I hand you a statement headed "W. F. Jacoby & Company, Average Cost of Coal from April 1, 1904, to April 1, 1905, Falcon No. 2 Mine," and ask you if that is a correct statement of the cost of the coal to your firm at Falcon No. 2?

Mr. Jacoby: It is a correct statement for the year. Yearly average, yes, sir.

Mr. Glasgow: I ask to have that paper filed.

(The paper was received in evidence and

marked "Complainant's Exhibit No. 3, Attached to Mr. Jacoby's Testimony.")

Mr. Glasgow: I also hand you a statement as to the cost of coal from April 1, 1905, to October 15, 1905, Falcon No. 2 mine, giving monthly cost of coal and the cost for the whole period, and ask you whether that is a correct statement of the coal to you?

Mr. Jacoby: It is.

Mr. Glasgow: I will have that filed.

(The paper was received in evidence and marked "Complainant's Exhibit No. 4, Attached to Mr. Jacoby's Testimony.")

Mr. Glasgow: Have you had made up a statement of the tonnage shipped by your company from Falcon No. 2 mine from April 1, 1904, to October 15, 1905?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Is this a correct statement which I hand you, showing the number of days in each month, the number of Sundays, and the number of legal and miner's holidays, and the days when the mine was disabled, caused by accident, etc., and the actual number of days when the mine was capable of producing its full daily capacity, the rated capacity of the mine, etc?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: That is a correct statement, is it?

Mr. Glasgow: And also showing the tons actually shipped by way of the Pennsylvania Railroad?

Mr. Jacoby: Yes, sir. That statement was made up by my bookkeeper, and I believe it to be correct.

Mr. Glasgow: Under your supervision?

Mr. Jacoby: Under my supervision.

Examiner Brown: It is taken from your books, is it?

Mr. Jacoby: From the original books of——

Mr. Glasgow: I will have that filed.

(Paper received in evidence and marked "Complainant's Exhibit No. 5, Attached to Mr. Jacoby's Tsetimony.")

Mr. Glasgow: Mr. Jacoby, have you had made up a detailed estimate of the cost of the coal to your firm to put in on the cars, from April 1, 1904, to April 1, 1905, based upon your being able to ship, or having cars to ship, the number of tons at which your mine was rated?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Is this the statement you have gotten up?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: I will have that filed.

(Paper received in evidence and marked "Complainant's Exhibit No. 6, Attached to Mr. Jacoby's Testimony.")

Mr. Glasgow: I see, Mr. Jacoby, that you estimate that the coal would have cost you to put in on the cars during the period from April 1, 1904, to April 1, 1905, eighty-nine cents and a fraction a ton.

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Would that same estimate apply for the period from April 1, 1905, to October 15, 1905?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: I suppose your coal actually cost you more than that, that you did get out?

Mr. Jacoby: A great deal more at times. It depended upon what our car supply was.

Mr. Glasgow: Explain to the Examiner why it is that the coal costs more than this average statement which you have filed.

Mr. Jacoby: Due to the same cost of organization and maintenance when we had cars to load 2000 tons, instead of our full capacity.

Examiner Brown: That is, I understand, you had to have the same force of men?

Mr. Jacoby: Practically the same so.

Examiner Brown: To load ten cars as you would have had to load fifteen?

Mr. Jacoby: Yes, sir; or twenty or thirty as the case might have been. I made liberal allowances in that estimate for the increase in tonnage, the difference between what we had and what that estimate shows.

Mr. Glasgow: Have you got a month there that you could illustrate what you mean?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Is it in that statement?

Mr. Jacoby: It is in the first statement, 1904-5. It shows the two extreme months. The largest month we had in this year appears to have been, or was, May, 1904. In that month we produced 5478 tons and a fraction. The total cost of that was 97 cents and a fraction, to put it on the cars.

Mr. Glasgow: That is the average cost?

Mr. Jacoby: That is the average cost for that month; yes, sir.

Mr. Glasgow: The average actual cost, I mean?

Mr. Jacoby: Yes, sir. Now we go to February, 1905, which was the lowest output we have had, and it amounted to 1773 tons, and the actual average cost there was $1.19½. That was all due to the difference in the output.

Mr. Glasgow: Was there any physical reason why you could not have shipped as much in February as in the previous May, if you had had cars?

Mr. Jacoby: Absolutely no reason. We could have shipped a great deal more than that, than we did in May, if we had had the cars. There was not any time in that year when we had anywhere near a full supply of cars or as many as we could have loaded.

Exaaminer Brown: Do you know in any general way, take throughout that year, what per cent. of your capacity of cars you received?

Mr. Jacoby: I could only give you that approximately.

Examiner Brown: Yes, approximately.

Mr. Jacoby: Approximately, I should say 25 per cent.

Examiner Brown: You got 25 per cent. of the capacity of your mine?

Mr. Jacoby: I should say approximately, yes.

Examiner Brown: And that irregularly. That is you did not get them regularly, 25 per cent. each day, but intermittently?

Mr. Jacoby: Yes, sir; they were very irregular. The tonnage sheets show the way in which they came.

Mr. Glasgow: Were there intervals of idleness at your mine by reason of lack of cars to ship?

Mr. Jacoby: Yes, sometimes as much as ten days before a single car came.

Mr. Glasgow: Then at other periods you would get one day a number of cars in, would you?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Another day, there would be one or two?

Mr. Jacoby: Straggling, or none.

Mr. Glasgow: Did you have any individual cars?

Mr. Jacoby: No, sir.

Mr. Glasgow: Did you ship any railroad fuel?

Mr. Jacoby: No, sir.

Mr. Glasgow: Did you ship any foreign railroad fuel?

Mr. Jacoby: No, sir.

Mr. Glasgow: Did you have any cars allotted to you arbitrarily?

Mr. Jacoby: I believe there were a few Delaware

& Hudson cars for commercial coal that were consigned to me during the early part of 1904, I think something like four or five a week, that the Delaware & Hudson sent down to help on certain business I had in New England. I counted them, however, the same as the Pennsylvania Railroad cars, in the statement which is in evidence.

Mr. Glasgow: You counted them in the statement and charged them against your mine?

Mr. Jacoby: Yes, sir; just the same.

Mr. Glasgow: How long did that continue?

Mr. Glasgow: I forget just when they did stop, but I think it was some time during June or July. I only had them a while.

Mr. Glasgow: 1904?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: After that time did you have any cars allotted to you except Pennsylvania Railroad cars, I mean under that distribution?

Mr. Jacoby: No. I borrowed in the early part of 1905 probably 30 or 40 Cambria Coal Mining Company's steel cars to help me out on a vessel I had at tidewater, which I was loading for the Government, and Colonel Coryell, who was a friend of mine, loaned those cars to me because I could not get any from the railroad company to finish the vessel; but those were the only ones I had, and I counted those in the same as though I had received them from the Pennsylvania Railroad.

Mr. Glasgow: So in your statement of what you have received, you have counted every car, regardless of where it came from?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Have you any statement here showing monthly the tonnage from your mine, in a kind of consolidation form?

Mr. Jacoby: Well, the tonnage by the month is all those on those statements in the tonnage sheets. The accurate tonnage is shown on this statement, which came from the mine each month on the Pennsylvania Railroad weights.

Mr. Glasgow: Have you had a statement made by months from April 1, 1904, down to and including October 15, 1905, showing the average market price realized on Falcon No. 2 coal shipped by you?

Mr. Jacoby: Yes, sir. Mr. Weber made that statement up.

Mr. Glasgow: Under your direction?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: From your books?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: I ask you if this is correct?

Mr. Jacoby: That is the statement.

Mr. Glasgow: I will have that filed.

(Paper received in evidence and marked "Complainant's Exhibit No. 7, Attached to Mr. Jacoby's Testimony.")

Mr. Glasgow: Have you made up a statement showing the amount of the claim for which you ask reparation, covering April 1, 1904, to April 1, 1905, from the Falcon No. 2 mine, and from April 1, 1905, to October 15, 1905, showing the total of your claim for reparation in this proceeding?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Is this such a statement?

Mr. Jacoby: That is the statement, yes, sir.

Mr. Glasgow: Is it made up from your books?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And you believe it to be correct?

Mr. Jacoby: I made it up myself, yes, sir.

Mr. Glasgow: And you believe it to be correct?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: I will have that filed.

(The paper was received in evidence and marked "Complainant's Exhibit No. 8, Attached to Mr. Jacoby's Testimony.")

Mr. Glasgow: Did you during the period from April 1, 1904, make any demand on the Pennsylvania Railroad Company for cars in addition to what you got?

Mr. Jacoby: Yes, sir; I made regular demands on them for what I got, both here and at the mines. I wrote them letters regularly every week or two, calling their attention to the miserable supply of cars we were getting.

Examiner Brown: While they are getting out those letters, in order to give a picture of the situation down there, I would like to ask a few questions. There are a number of mines situated on that Moshannon branch, are there not?

Mr. Jacoby: Yes, quite a number.

Examiner Brown: Can you give approximately how many?

Mr. Jacoby: Taking a radius of say ten miles around? Starting with Berwind-White Company's shaft No. 7?

Examiner Brown: How far is that from Osceola, about?

Mr. Jacoby: I should say that would be about eight miles.

Examiner Brown: That would be about a mile from your Falcon No. 2 mine?

Mr. Jacoby: Yes, about a mile or a mile and a half. I should say fully a mile and a half. Then right along the track comes Berwind-White No. 16, No. 27, and Falcon No. 2; then leading off just before you get into Smoke Run station are three branches; one branch goes to Berwind 28 mines, and some other little

mines upon that branch; Standard No. 4, and I think there are a few others—I forget the names of them. The other little branch goes up to Leland mine, belonging to the Cambria Coal Mining Company. Berwind-White No. 22, then to the northwest is the James mine——

Examiner Brown: That is the Bulah Coal Company?

Mr. Jacoby: Yes, No. 1.

Examiner Brown: How far is that property situated from yours?

Mr. Jacoby: About a mile.

Examiner Brown: Farther up?

Mr. Jacoby: That is in the opposite direction. I am going back in an opposite direction.

Examiner Brown: Going towards Osceola?

Mr. Jacoby: Yes, sir; on the northwest side. I came around on the south side of the territory and I am now on the northwest side. I will illustrate on a piece of paper, if you like.

Examiner Brown: I just wanted it stated in a general way. So that that is about all the business that is conducted on that branch?

Mr. Jacoby: No, there are a good many others, but that is within a radius of three miles.

Examiner Brown: But the business that that line conducts from Osceola up the Moshannon branch is coal business? There is very little else?

Mr. Jacoby: Very little. They run three or four passenger trains a day, that is, two or three each way.

Examiner Brown: That is from Osceola up?

Mr. Jacoby: Yes, sir.

Examiner Brown: Are there any local freight trains?

Mr. Jacoby: One each way a day.

Examiner Brown: Are there any towns situated between Osceola and the end of the branch?

Mr. Jacoby: Yes, sir.

Examiner Brown: Pretty good sized towns?

Mr. Jacoby: Yes, sir; Houtzdale and Smoke Run, and quite a number of small towns. Ramey and Maderia.

Examiner Brown: Did you have any difficulty in getting your cars into your mine on your switch?

Mr. Jacoby: No, not after they got there.

Examiner Brown: How long was your switch?

Mr. Jacoby: The length of it in feet I do not remember, but it was put in by the railroad company to accommodate 18 empty and 18 loaded cars.

Examiner Brown: That is, it would hold, then, 36 cars?

Mr. Jacoby: Thirty-six cars, both loads and empties; that is, from the center of the tipple to the tail end of the siding, it was put there long enough to accommodate 18 empty cars.

Examiner Brown: What was the tonnage capacity of the siding?

Mr. Jacoby: Well, 18 cars would have been greater than 450 tons, the rated capacity. At that time, however, when it was put in, we had a great many more 25-ton cars than we had later. Take a steel car, which is about the same length, it holds about twice as much, so that the capacity would be greater.

Examiner Brown: I suppose you are counting that these wood cars hold about 15 tons?

Mr. Jacoby: No, we figure 25 tons as an average, and the steel cars we figure 47 tons as an average, so if we could have gotten, say, five steels and the balance in wooden cars, it would have been equivalent to twenty wooden cars.

Examiner Brown: Clark Brothers bought you out, did they?

Mr. Jacoby: Yes, sir.

Examiner Brown: You were connected with this property before 1904?

Mr. Jacoby: Yes, sir, I put the mine in there; it was put in under my supervision, and I was up there in 1900, I think, and it was then the Forest Coal Mining Company, and the Forest Coal Mining Company, W. F. Jacoby & Company and some other interests were consolidated into the Penn Collieries Company in 1902. I was retained as vice-president of the Penn Collieries Company, and therefore identified with the same mine up to the time I bought it as an individual from the Penn Collieries Company, and resigned my position as vice-president, and formed the firm of W. F. Jacoby & Company on April 1, 1904.

Examiner Brown: You have only one opening there?

Mr. Jacoby: Yes, sir.

Examiner Brown: When you put that in, your idea was that it should have a capacity of about 450 tons a day?

Mr. Jacoby: Five hundred tons a day; we figured on taking out 500 tons a day.

Examiner Brown: Have you ever been able to do that since 1900?

Mr. Jacoby: No, sir; never.

Examiner Brown: Did you have any difficulty about getting cars prior to 1904 as well as since?

Mr. Jacoby: Yes, sir, the same difficulty existed right along. During the Penn Collieries' time, however, or in 1902, we took out of that mine something over 7000 tons, which was due to cars that were placed there by the New York, New Haven & Hartford Railroad Company. That gave us an opportunity to show

what we could do when the mine was in its infancy. It did not have near the development in 1904 that it did on April 1, 1904, but even then we produced some 7000 and odd tons, at a cost of 91 cents.

Examiner Brown: During your development period there, while you were putting the mine in, did you receive any more cars or with any more regularity than afterwards?

Mr. Jacoby: When we were putting the mine in, of course, we were driving our headings first, and only had three or four cars a day, when we were starting up, and we had some little coal stocked up outside that we loaded into cars. Cars were very hard to get, even then, but we did not feel it so much because we did not have the capacity at that time. But as we went along, as we finally did get some capacity, it was just as hard then as it was later to get cars, and it resulted finally in the New Haven sending their cars over to get their fuel coal out at that time.

Examiner Brown: At your mine is there a town near by?

Mr. Jacoby: Yes, the opening is almost in the town.

Examiner Brown: What town?

Mr. Jacoby: Smoke Run.

Examiner Brown: The miners live in the town?

Mr. Jacoby: Yes, sir.

Examiner Brown: You have no miner's houses there?

Mr. Jacoby: No, we are right in the town. In fact we could almost throw a stone from the end of the tipple to the post office; it is practically right in the town.

Mr. Glasgow: Then in 1902, as I understand you, you were enabled, as I understand, by some contract with the New Haven road to get cars, and shipped at that time 7000 tons a month?

Mr. Jacoby: The Penn Collieries Company did.

Mr. Glasgow: Well, that was operating the same mine?

Mr. Jacoby: Yes.

Mr. Glasgow: I mean you shipped from this same mine, Falcon No. 2?

Mr. Jacoby: Yes.

Mr. Glasgow: And at that time you say the mine was not developed to the capacity it was in April, 1904, when you took hold of it?

Mr. Jacoby: No, it was in its infancy, practically.

Mr. Glasgow: After April 1st, 1904, I understood you to say you were continually making demands for cars?

Mr. Jacoby: Yes.

Mr. Glasgow: Did you file requisitions with the Pennsylvania Railroad Company for cars?

Mr. Jacoby: My superintendent made a daily requisition from Smoke Run to the car distributor's office at Tyrone. I believe sometimes, as I understand it, they were ordered by telephone and confirmed by these reports. The printed reports that the Pennsylvania Railroad Company furnished?

Mr. Glasgow: I show you for identification the copies of requisitions which you made, and ask you if these are copies of the requisitions during the period I have mentioned, from April 1st, 1904, down to October 15th, 1905, which you filed with the Pennsylvania Railroad for cars. There are two batches of them?

Mr. Jacoby: Yes.

Examiner Brown: Describe how that was done.

Mr. Jacoby: That was done by the superintendent at the mines. He made those out daily, and forwarded them to the superintendent, J. K. Johnston, at Tyrone.

Examiner Brown: By mail?

Mr. Jacoby: By mail; yes, sir.

Mr. Glasgow: Who was that superintendent?

Mr. Jacoby: Mr. Johnston, J. K. Johnston.

Mr. Glasgow: Who was your superintendent?

Mr. Jacoby: Mr. J. H. Miller.

Mr. Glasgow: He is here?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Did you supplement or do anything in the way of correspondence yourself with officers of the Pennsylvania Railroad in charge of car distribution, urging that additional service be given you?

Mr. Jacoby: I certainly did.

Mr. Glasgow: With whom did you correspond on the subject?

Mr. Jacoby: With all of them. With Mr. Trump.

Mr. Glasgow: Who is Mr. Trump?

Mr. Jacoby: Superintendent of transportation; with Mr. Creighton, general superintendent at Altoona; with Mr. Johnston, superintendent of the Tyrone division; with Mr. Patterson, superintendent of transportation of the Pennsylvania Railroad; and I also wrote to Mr. Searles, who was general coal freight agent, appealing to him for assistance, when I was in considerable trouble in the way of getting my vessels loaded with coal for the United States Government purposes, and so on.

Mr. Glasgow: Mr. Jacoby, so that the record may be clear, when they ascertained the number for distribution, when that number was ascertained, I do not understand you complain that you did not get your proportion of those cars. What I mean is this: I understand that the Pennsylvania Railroad took out of their total number of cars for distribution a certain number of cars for the Tyrone division; is that right?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Then when those cars went to the Tyrone division they took out of the number individual

cars, fuel cars, certain arbitrary allotments of cars, and the remainder was for distribution among the collieries along the line?

Mr. Jacoby: I do understand it.

Mr. Glasgow: Now, as I understand it, you do not complain that that remainder was not distributed among the collieries properly?

Mr. Jacoby: No, I believe that remainder, what little it happened to be, was made by Mr. Freeman on the Tyrone division pretty accurately.

Mr. Glasgow: You believe it was divided in accordance with the percentages?

Mr. Jacoby: Yes, sir; I believe Mr. Freeman delivered them as evenly as he could.

Mr. Glasgow: But the real question of controversy here is whether you should not have had your proportion of cars based upon all the cars that were for distribution upon that division?

Mr. Jacoby: Yes, sir. And I might add there, Mr. Glasgow, that there may have been times when Mr. Freeman had instructions to disregard to some extent the general rule of remainder, and that Berwind-White Company got some of those cars when we did not get our share of them, when things were strenuous.

Mr. Glasgow: But I mean as a general proposition, I have correctly stated to you wherein was the trouble that you suffered from.

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Were there cars which came on that line which were assigned arbitrarily to certain mines, and which were not put into the general distribution, or charged to those that received them?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Those were individual cars?

Mr. Jacoby: Individual cars, and presumably foreign fuel cars; at least they called them so; whether

or not they were, I do not know, the Pennsylvania Railroad fuel cars.

Mr. Glasgow: Do you know the names of any of the persons on that division for distribution who had assigned to them individual cars which were not counted against their percentage, or which were not put into their division?

Mr. Jacoby: Yes, there are quite a number of them. I presume I could name some of them. I think Mr. Miller could name them all, perhaps.

Mr. Glasgow: Just name a few of them.

Mr. Jacoby: Berwind-White Coal Mining Company, individual cars.

Mr. Glasgow: They had a shaft right near you?

Mr. Jacoby: Yes, sir; they were right near us there. The Cambria Coal Mining Company, both individuals and consigned cars; Bettz Coal Mining Company; Lawton & Cox; Carona Coal Company; Bulah Coal Company.

Mr. Glasgow: That is enough.

Mr. Jacoby: The Bulah cars were individual cars.

Examiner Brown: Each one of these companies which you have named, you consider for one reason or another were getting an arbitrary allotment which was taken out of the general number of cars that was furnished for disposition on the Tyrone division?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: I suppose that taking out those cars, it left comparatively few cars for distribution?

Mr. Jacoby: Very few, very few indeed.

Mr. Glasgow: I understand your complaint to be further, Mr. Jacoby, in the distribution to the Tyrone division that by reason of assignments to other divisions for arbitrary assignment of cars, the Tyrone division did not get its proportion of distribution for the mines thereon?

Mr. Jacoby: I have reason to believe that is the case.

Mr. Glasgow: That is your complaint?

Mr. Jacoby: Yes.

Mr. Glasgow: So that your complaint is made up of two items: First, that the Tyrone division did not get its proper proportion of the entire equipment?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And second, that the proportion assigned to the Tyrone division was not divided among the operators thereon, but that a large number of cars were taken out and arbitrarily assigned, and that only the residue was divided among the mines in accordance with the percentage?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Those are the two items of the complaint?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Did you have any trouble in keeping your miners by reason of this lack of regularity to which you have referred?

Mr. Jacoby: We certainly did.

Mr. Glasgow: Have you instances of it?

Mr. Jacoby: Well, take for instance on the 1st of January, 1905, I believe that we had 120 or 125 men in Falcon No. 2 mine. On April the same year they had dwindled down I think to 18. They had left our place reluctantly, many of them, and followed the cars; wherever they went they would go to seek work; they went to mines where the cars went. And when we——

Mr. Gowen: What period are you contrasting there?

Mr. Jacoby: From January 1st, 1905, to April 1st, 1905. My statements show that during February, where I loaded 1700 tons, we had very poor work, and naturally the men would leave.

Mr. Glasgow: I understand that during that period

also you had periods of say ten days when your mine was practically closed; is that true?

Mr. Jacoby: Yes, sir, that is true.

Mr. Glasgow: Did any of these miners leave you to go to the Berwind-White Company?

Mr. Jacoby: Yes, a great many of them.

Mr. Glasgow: Do you know why?

Mr. Jacoby: On account of the cars. They made the statement that they could not live, and had to go where the cars went. And so I understood.

Mr. Glasgow: You spoke a few minutes ago of your correspondence with officers of the Pennsylvania Railroad Company re-enforcing and urging distribution to you of cars. I have here a batch of correspondence, which I do not care to encumber the record with, but I will hand you a copy of a letter of April 18, 1904, to Mr. M. Trump, General Superintendent, Pennsylvania Railroad, Altoona, Pennsylvania, and his acknowledgment of April 21st, thereof, and ask you if that is a sample of the letters which you wrote on this subject?

Mr. Jacoby: Yes, that is a fair sample of the appeals I made from week to week, and from day to day and from month to month.

Examiner Brown: I suppose it is conceded that frequent requests were made during that period to these various officials?

Mr. Gowen: Yes.

Examiner Brown: So it is not necessary to put all these in.

Mr. Glasgow: I will just put this one in, the letter of Mr. Jacoby to Mr. Trump, and Mr. Trump's reply. I will read them into the record.

Examiner Brown: They may be spread upon the record.

"April 19, 1904.

PERSONAL.

Mr. Trump, Gen. Supt. P. R. R.,
Altoona, Pa.

Dear Sir:

Permit me to call your attention to the fact that Falcon No. 2 Mine has been without cars since the 11th inst, with the exception of Saturday the 16th, on which day we had five (5) steel cars. I am reluctant to continually complain about matters of this kind and always have been willing to bear with you when conditions were strenuous. It is needless to say that it is simply suicidal to make an attempt to exist without getting any transportation facilities at all and maintain an organization with which to operate our mine. If it has become the policy of your Company to continually subject us to these hardships and unjust treatment, we certainly would like to know it in order that we may deal with the question as it really is. I might add that we are not working the Falcon Mines numbers 1 and 3, so as to get the benefit of car supply at No. 2 mine, and thereby hold our miners. Notwithstanding this, however, within the last week 50% of men have gone to other mines where they have better car supply and steady work. I make this appeal to you hoping that you will give the matter due and careful consideration and arrange to give us, at least, a portion of what a shipper has a reasonable right to expect from a Road on which their operations are located, and on which they are dependent upon for transportation facilities.

Very truly yours."

cco PENNSYLVANIA RAILROAD COMPANY. 504

Pennsylvania Railroad Division

Office of General Superintendent.

Mr. Trump,

Acting General Superintendent.

C-D Altoona, Pa., April 21, 1904.

Messrs. W. F. Jacoby & Co.,

1014 Commonwealth Trust Building,

Philadelphia, Pa.

Acknowledging your personal favor, April 19, relative to car supply at Falcon No. 2 mine. The supply of cars all around has been very short for some little time past, so that it has been impossible for us to make any kind of a liberal distribution.

We have referred your letter to the Superintendent of the Tyrone Division, with request that he see that your mines receive their propor proportion of cars, out those we have for distribution.

M. TRUMP,

Acting Gen'l Superintendent,

C."

Mr. Glasgow: You had charge of selling the coal, did you?

Mr. Jacoby: For W. F. Jacoby?

Mr. Glasgow: Yes.

Mr. Jacoby: Jointly with Mr. Weber; yes, sir.

Mr. Glasgow: I do not mean exclusively, but you were located in Philadelphia?

Mr. Jacoby: Yes.

Mr. Glasgow: And you had charge with your partners, the firm of W. F. Jacoby & Company had charge of selling this coal?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Did you have any difficulty in disposing of the coal from that mine?

Mr. Jacoby: No, we had absolutely no difficulty in disposing of it. Our business has been very much injured, however, directly after the period between January, 1905, and April, 1905. Lots of people that had appreciated the quality of the coal and were favorable to us, objected to buying on account of the treatment they had gotten during that period, and while they had nothing against us personally, a number of them made statements——

Mr. Glasgow: I do not care about going into that particularly, but what I want to know is did you have orders for this coal which you could not take, or did you have any orders which you had to cancel on account of not being able to fill them on account of the car supply?

Mr. Jacoby: We always had plenty of orders ahead; we always had, and we could have sold a great deal more than we did.

Examiner Brown: He asked you, do you know now of any contract which you have to supply any firm or individual with cars that was canceled or anulled, because of inability to get cars?

Mr. Jacoby: Yes, sir. Mr. George W. Spates, who was vice-president of the Maryland Coal and Coke Company in Baltimore, came to me directly after April, 1905, and started to negotiate for a quantity of the coal to be shipped during the year. He wanted me to obligate the firm for 40,000 tons, stating that he had taken a number of United States Navy contracts, and that he wanted to apply the coal on those contracts. I told Mr. Spates that I felt I would not be able to do that by virtue of the trouble we had experienced in the past; that I would not feel that I could obligate myself for 40,000 tons. The quantity was then left open and

the price agreed upon, and it resulted in order, and the few orders that I got I could not fill satisfactorily.

Mr. Glasgow: Why?

Mr. Jacoby: Because I could not get the cars with which to take care of the vessels at tidewater when they came in, and I was obliged to buy coal from the Cambria Coal Mining Company, and borrow their cars, and so on, in order to get the vessels out. Mr. Spates became very much dissatisfied, and said that there was very little use of his trying to get on with me, because I could not produce the coal, could not give him the coal.

Mr. Glasgow: You say you could not produce the coal; what do you mean?

Mr. Jacoby: I mean to load the vessels.

Mr. Glasgow: You could produce the coal?

Mr. Jacoby: I meant it in a different sense.

Mr. Glasgow: But you could not ship it?

Mr. Jacoby: But I could not ship it; I could not produce it at the ship side.

Mr. Glasgow: You could not ship the coal on account of lack of cars?

Mr. Jacoby: Yes.

Mr. Glasgow: Did you ever leave any car without assignment on your tracks for any length of time?

Mr. Jacoby: No, sir.

Mr. Glasgow: Always had orders?

Mr. Jacoby: Yes, sir; and marked them out promptly.

Mr. Glasgow: On that subject of orders which you could not take, I want to offer a letter of August 21st, 1905, to Mr. J. G. Searles, general coal freight agent of the Pennsylvania Railroad. Did you write that letter?

Mr. Jacoby: Yes.

Mr. Glasgow: I will have that letter spread upon the record.

"August 21, 1905.

J. G. Searles, Gen. Coal Freight Agent,
Penna. R. R. Co.,
Philadelphia, Pa.

Dear Sir:

This is to inform you that we have Government contract business on our books to the amount of 10,000 tons, for shipment via your tidewater terminals.

On the 11th inst., we charactered against these contracts, the barge 'Josephus' (which is now in the stream, waiting to be docked) of 2400 tons capacity to load at Greenwich Piers. We are still short about 400 tons of coal to complete this barge, after having been compelled, at considerable detriment and expense, to purchase 1000 tons of outside coal, and obtained the right to load at our own mines, about 25 individual cars on this business.

We booked this vessel with Mr. Patterson's office on the 12th inst. See copies of our letter and his brief reply; also of our letter to Mr. Trump. No reply to the latter has yet been received.

Since booking the vessel our two mines have received a total of but eleven P. R. R. cars. We are informed through the Transportation Department, that, after providing ourselves, the bulk of the cars that have been loaded on this business, they will be charged against us in the distribution, and will operate to still further curtail our supply of P. R. R. cars. The inference being that your Company will do less for us in facilitating the shipment of this special contract on competitive tide water business, than they have been doing in the matter of line business.

We are in position to secure another barge, of like tonnage, on the same kind of business (in addition to the tonnage above mentioned), provided we demonstrate our ability to load vessels upon reasonable notice.

It strikes us, that this competitive business ought to have from your Company some considera-

tion, from a traffic and commercial stand-point, and our object in writing to you, is to draw to your attention this phrase of the question, as we take it your Department desires to secure this additional tonnage. You will observe, we are already in position to furnish, if we are not too badly handicapped and embarrassed by the methods of the Transportation Department.

Very truly yours,"

Mr. Gowen: Was there any reply to that letter, Mr. Jacoby?

Mr. Jacoby: I really do not know whether there is or not. I do not remember seeing it. If there is, it is in that batch of correspondence there.

Mr. Glasgow: If there is, will you please look it up and file it?

Mr. Jacoby: I might say in connection with that, that I had a personal interview with Mr. Searles afterwards on this subject, and I think he asked me to come to his office, and probably there was no letter.

Mr. Glasgow: If you find that you have a reply to that, will you please file it?

Mr. Jacoby: Yes.

Mr. Glasgow: That is all.

CROSS-EXAMINATION.

Mr. Gowen: I understood you acquired this leasehold interest from the Penn Collieries Company?

Mr. Jacoby: Yes, sir.

Mr. Gowen: At the time you acquired it, the mine was a going mine?

Mr. Jacoby: Yes.

Mr. Gowan: What was the consideration paid?

Mr. Jacoby: $25,000.

Mr. Gowen: You retained it a little over a year?

Mr. Jacoby: Eighteen months.

Mr. Gowen: And what amount did you dispose of for?

Mr. Jacoby: $32,500.

Mr. Gowen: What amount of coal in the meantime ıd you taken out?

Mr. Jacoby: I had taken out during the year 1904-05, April 1st, 1905, to April 1st, 1905, 38,000 and me odd tons. It is given there on the statement. I) not remember the exact amount.

Mr. Gowen: And between that and October?

Mr. Jacoby: About 17,000 tons.

Mr. Gowen: I suppose the terms of sale to Clark rothers and Jacoby were evidenced, were they not, ' an agreement between you?

Mr. Jacoby: Yes, sir.

Mr. Gowen: I would be glad to have you produce at agreement or a copy of it.

Mr. Jacoby: Mr. Rattew, their secretary, is here th those title papers, and I believe he will produce em.

Examiner Brown: I suppose those title papers ow the amount and acreage of coal, and all that?

Mr. Jacoby: With the title papers is the lease and is the description of the land.

Mr. Gowen: Now, the $32,500 which you got for e sale of your interest, was that all the considera-n passing to you?

Mr. Jacoby: Yes, that is all.

Mr. Gowen: Are you about that, Mr. Jacoby?

Mr. Jacoby: Yes, that was all the consideration I t for it.

Mr. Gowen: I am speaking of you individually, t of Jacoby Brothers——

Mr. Jacoby: W. F. Jacoby & Company?

Mr. Gowen: Yes.

Mr. Jacoby: Yes, that was the consideration and e only consideration.

Mr. Gowen: You have presented to us here some statements showing the average cost of producing coal. Taking that of April 1st, 1904, which is the first month covered by the claim, will you please state to what extent—I am going through this statement item by item—will you please state whether the item of royalty is in anywise effected by the tonnage mined?

Mr. Jacoby: Yes, it is in some degree.

Mr. Gowen: In what way?

Mr. Jacoby: By boiler and house coal, what we call house coal, sold at the mines to the miners, and also on the boiler coal, on that we did not pay any royalties, with the owners, and that made a variation in the royalty. The straight royalty was fifteen cents a ton, but on account of that, the amount of those statements varies a little from month to month.

Mr. Gowen: But how would the item of royalty per ton then be increased in a month in which the production was low, would not the tendency be to have it decrease?

Mr. Jacoby: I do not know how the figures were arrived at exactly——

Mr. Gowen: I am not asking about the figures, but am asking if it is not a fact that it is so?

Mr. Jacoby: Those figures were made by my bookkeeper at the time, and it is not quite clear to me how he arrived at them.

Mr. Gowen: Having a knowledge of mileage yourself, are you able to suggest why the item of royalties per ton should materially vary in a month in which the production was heavy, and one in which the production was low?

Mr. Jacoby: No, I do not,——

Mr. Gowen: Take the item of mining, which I presume covers miner's wages. Should there be any difference between two months in which the production

ried greatly as to the cost per ton ascribable to ning?

Mr. Jacoby: No, the miner's wages themselves I not think would vary much.

Mr. Gowen: How is it as to yardage?

Mr. Jacoby: Yardage would be entirely different. at would vary according to the number of tons oduced, somewhat.

Mr. Gowen: Yardage, of course, is an expendi- e connected with the development of the mines?

Mr. Jacoby: Yes, sir.

Mr. Gowen: And it would be incurred whether the ne was putting out 5000 or 10,000 tons?

Mr. Jacoby: Yes.

Mr. Gowen: The only difference being that in one e you would divide it among 5000 tons, and in the er 10,000 tons?

Mr. Jacoby: It would be affected that way.

Mr. Gowen: The same is true with the item of k?

Mr. Jacoby: Yes, sir; that rock, I believe, was result of turning off rooms, necking off rooms, l it would vary somewhat.

Mr. Gowen: But what you have said as to yard- is true as to rock, the expenditures would be the ne, only in each month you would have a larger nber of tons proportionately?

Mr. Jacoby: As to yardage, the mine when I took was developed to a considerable extent, and while yardage on a larger output would be somewhat ater than it would be on a smaller output, com- ratively, it would not necessarily follow that it uld be just as great comparatively as the output ld be, because there is a development there al- dy.

Mr. Gowen: Now, as to drainage. How is that n affected by the number of tons?

Mr. Jacoby: That would not be affected very much; it would be about the same, I suppose.

Mr. Gowen: Now, as to roads?

Mr. Jacoby: Well, the road was there, and that would only have to add——

Mr. Gowen: I am asking these questions with reference to the difference between months.

Mr. Jacoby: The road would be increased somewhat; yes, sir, if the output was larger; the item of cost would be increased somewhat.

Mr. Gowen: In other words, the expenditure on account of road would be greater than in a month in which the tonnage was large than in a month in which it was small?

Mr. Jacoby: Very little.

Mr. Gowen: But somewhat greater?

Mr. Jacoby: Somewhat greater. It would be much less per ton on the output, but the item itself would be increased.

Mr. Gowen: How about the item of electric haulage?

Mr. Jacoby: On an increased output that would be considerably higher, the item itself, but price per ton would be much lower.

Mr. Gowen: What do you include in that item of electric haulage, what expenditures?

Mr. Jacoby: That electric haulage on that statement there represents a motorman, a trip rider, fireman and engineer, the wear and tear, I think, on the machinery, and such things as that. There may be some other little few items that I do not recall.

Mr. Gowen: Motorman and engineer, did you say?

Mr. Jacoby: Engineer, fireman, motorman and trip rider; those are three salaried men by the month.

Mr. Gowen: How are they paid?

Mr. Jacoby: The engineer and fireman are paid by the month.

Mr. Gowan: And the motorman?

Mr. Jacoby: I think by the day, and also the trip rider by the day.

Mr. Gowen: Take the item of operating tipples; what does that represent?

Mr. Jacoby: That represents a weigh man, a dumper and a shifter, the man who shifts the cars under the tipple.

Mr. Gowen: How are those men paid?

Mr. Jacoby: The weigh man was paid by the month, and the other two men, I think, were paid by the day. We could not avail ourselves of the monthly rate of them all on account of the irregularity of car supply. It costs us more comparatively to pay them by the day than it would by the month.

Mr. Gowen: When you speak of men being paid by the day, suppose that on a certain day you ran a quarter of a day, what adjustment of wages was there?

Mr. Jacoby: For a quarter of a day I think we were obliged to pay them for half a day, after they came there.

Mr. Gowen: There was nothing less than a half day, you think, in the payment of wages?

Mr. Jacoby: No, I think we managed to find something for them to do, and kept them for half a day, whether we needed them or not.

Mr. Gowen: But in the case of all the day men, is it a fact that if they did not work more than a half day, you did not pay more than half a day's wages?

Mr. Jacoby: Yes.

Mr. Gowen: And if they did not work for more than a quarter of a day, did you not pay them a quarter day's wages?

Mr. Jacoby: There may have been a few exceptions, but my recollection is that when they came there, we kept them for half a day, and paid them that way.

Mr. Gowen: Take the item of ventilation; is that a fixed charge per month?

Mr. Jacoby: Practically so.

Mr. Gowen: How about pit boss?

Mr. Jacoby: That would be a fixed charge. We paid him by the month.

Mr. Gowen: Timbering?

Mr. Jacoby: That would have been an increase on a larger output.

Mr. Gowen: That was an item the cost of which was dependent upon the output?

Mr. Jacoby: Yes.

Mr. Gowen: It would be an increase as the output increased and fall off as it diminished?

Mr. Jacoby: Yes, sir. That represented props, and of course if we did not mine coal we did not need the props.

Mr. Gowen: Now as to maintenance of mine cars.

Mr. Jacoby: That would be slightly larger with the increased output.

Mr. Gowen: That increased and diminished with the use of the cars?

Mr. Jacoby: Not exactly, but it would have been somewhat larger. Superintendent's salary on that, of course, is a monthly salary also. It shows there.

Mr. Glasgow: The maintenance of the equipment, while it might be increased somewhat by larger output, the cost of maintenance per ton would decrease, would it not?

Mr. Jacoby: Very much decreased. All those items by virtue of increased tonnage would decrease very materially per ton. As shown by the estimated statement, I tried to make them very fair in that, and I have added in that in some cases as much as 200 per cent.

Mr. Gowen: If you had a lot of mine cars standing

idle there would be no expenditure on their maintenance; they would only require——

Mr. Jacoby: It is a very small matter anyway, the mine cars in themselves. That would have been a comparatively small item.

Mr. Gowen: The extent of the use of the mine cars really measures the extent of the maintenance, does it not?

Mr. Jacoby: Yes, sir.

Mr. Gowen: Now you have taken two months, May, 1904, and February, 1905, for the purpose of illustrating the increased cost per ton, due to a decreased output. Without going through those two statements at all exhaustively, I want to call your attention to certain features which those statements disclose. In May, 1904, the item of royalty per ton was $.149.

Mr. Jacoby: Fourteen and practically nine-tenths cents.

Mr. Gowen: Practically fifteen cents?

Mr. Jacoby: Yes, sir.

Mr. Gowen: While in February, 1905, it was .211?

Mr. Jacoby: Yes.

Mr. Gowen: How was that increased cost of the royalty brought about by the diminished output?

Mr. Jacoby: I cannot explain that to you, Mr. Gowen. I think the bookkeeper would better explain that, and get it clear, if it is just as satisfactory.

Mr. Gowen: Now, in February, 1905, the statement you have presented contains an item, "Cleaning snow and ice, .038"?

Mr. Jacoby: Yes.

Mr. Gowen: And no such item in May. That increased cost did not result from the diminished output?

Mr. Jacoby: No, that is right.

Mr. Gowen: There are a number of others, but I will not go into that any more. You were asked what

contracts you had at any time in force which you were unable to fill, due to your inability to secure cars. You spoke of one made with a Mr. Spath, was that the name?

Mr. Jacoby: Spates.

Mr. Gowen: Was that the contract which you referred to in your letter to Mr. Searles?

Mr. Jacoby: That was the same business. It was not a contract as a whole, but I had accepted orders there, I think I told Mr. Searles for about 10,000 tons, which I stated and considered as a contract obligation, but the contract as a whole was not taken.

Mr. Gowen: Where was that coal deliverable?

Mr. Jacoby: Part of it went to Newport Naval station, a torpedo station, Newport, Rhode Island, for which I chartered the vessel from New York; some of it went to Portsmouth Navy Yard, which I loaded at Greenwich Pier, and so on.

Mr. Gowen: What were the terms of your contract with Mr. Spates as to the point of delivery?

Mr. Jacoby: The point of delivery was the destination at which the coal was to be delivered. For instance, so many tons at Portsmouth and so many tons at Newport, and some at Boston, and I was to charter the vessels, and deliver to him the bill of lading for the cargo when completed, showing the destination.

Mr. Gowen: Then in this case the price which Mr. Spates was to pay you was the delivery price at ultimate destination.

Mr. Jacoby: The freight to Greenwich Pier, I think, was paid by the Maryland Coal & Coke Company, that is, it was charged direct to them by the Pennsylvania Railroad. The vessel freight, I think, also was paid by them; it was based on a delivered price, but those credits were made to them as they appeared, against the delivered price.

Mr. Gowen: Just what was the price that you were to receive from Mr. Spates?

Mr. Jacoby: I have forgotten the exact figures. I could get those, I think, from my books.

Mr. Gowen: You can give them to us?

Mr. Jacoby: I think so.

Mr. Gowen: Get those figures from your books, and give the answer to the stenographer, so that he can put it in at the proper place in this connection.

(The price was afterwards stated by the witness to be):

Price alongside Newport, R. I.,		$3.07½
R. R. freight to So. Amboy, N. J.,	$1.50	
Vessel freight So. Amboy to Newport, R. I.,	.42½	
		$1.92½
		$1.15
		$3.10
R. R. freight to So. Amboy, N. J.,	$1.50	
Vessel freight So. Amboy to Newport, R. I.,	.45	
		$1.95
		$1.15
Price alongside Portsmouth, N. H.,		$3.20
R. R. freight to Greenwich, Phila.	$1.30	
Vessel freight, Greenwich, Phila. to Portsmouth, N. H.,	.85	
		$2.05
		$1.15
Price alongside, Boston, Mass,		$3.15
R. R. freight to Greenwich, Phila.	$1.20	
Vessel freight, Greenwich, Phila. to Boston, Mass.,	.80	
		$2.00
	$2.00	$1.15

Examiner Brown: You say the freight was paid by the Maryland Coal & Coke Company. What relation have they to this?

Mr. Jacoby: They were really the buyers of the coal. They appeared as a commission house in the transaction.

Examiner Brown: Your contract was really with them?

Mr. Jacoby: Yes, really. That is, we loaded and shipped the coal for them. They are located in Baltimore.

Mr. Gowen: You did not sell that coal at the delivered price, and under an arrangement that you were chargeable with whatever the purchaser had to pay, either in the way of freight to the railroad company, or both freights and water rates?

Mr. Jacoby: No, I did not.

Mr. Gowen: Did you sell it f. o. b. at the mines?

Mr. Jacoby: No, it was based on the delivered price. They had taken the business at a certain delivered price, and in case of a loss by virtue of vessel freights going up steadily, or any thing of that kind, I was to stand a portion of that loss, and therefore it was based upon a delivered price at the various ports, with the understanding that they would pay the freight charges direct, and in other words use their own money to pay both the vessel freight and the railroad freight, and then have an adjustment afterwards.

Mr. Gowen: Well, you will give us the price, will you?

Mr. Jacoby: Yes.

Mr. Gowen: What, if any, other contracts had you for delivery of coal which you were unable to fill on account of lack of cars?

Mr. Jacoby: We had the American Can Company at Baltimore. We had continual trouble to keep them

supplied from time to time. We had that contract in the first year and also in the second year, I believe. And we had——

Mr. Gowen: Can you give us a statement of your contracts which you can take from your books, showing the contracts which you were unable to fill, without reference to the point of destination of the coal?

Examiner Brown: What you have reference to is the amount and the price at which it was to be sold, and which you could not fill because you could not get orders?

Mr. Gowen: Yes, give us the contracts which you took, the price, and the shipments which you made under those contracts.

Mr. Jacoby: Yes.

Mr. Glasgow: I will get him to add to that a statement of such contracts as he was unable to get or failed to get, because of his inability to get cars to ship the coal.

Mr. Jacoby: Here is a list. Those are partially filled contracts (producing paper).

Mr. Glasgow: You can get that statement up at another time.

Examiner Brown: Yes, the statement can be prepared and filed with the secretary.

Mr. Jacoby: Those contracts of course were partially filled, but what coal we applied on them was done in such a way that it was very hard to keep them going at times. There was friction all the time, and threatenings to buy coal on the outside and charging us with the difference, and so on, and it was not very satisfactory.

Examiner Brown: You can make a clear statement from your books that you had to supply, for instance, a certain firm with three cars a week, with 6000 tons per quarter, or 2000 tons per month, unless that

statement showed at the end of the month, or at the end of the period, the contract was unfilled for a certain amount?

Mr. Boulton: And how much you had to buy from other parties.

Mr. Gowen: That is all.

RE-DIRECT EXAMINATION.

Mr. Glasgow: And also the contracts which were offered to you, and which you could have filled, but which you had to decline on account of getting no cars.

Mr. Jacoby: Yes, that is the trouble. I had those few contracts, but I did not have enough coal to fill satisfactorily those that I did have, therefore it was useless for me to go and obligate the firm for any other contracts, because I knew on account of the discrimination that existed I could not fill those I did have.

Mr. Glasgow: I mean for you to get up a statement of the contracts which you might have gotten, at a price, but which you did not take on account of the trouble you had.

Mr. Jacoby: I shall be very glad to do that.

Mr. Gowen: Of course I would not care to cross-examine on any statement that Mr. Jacoby got up from his books, but if he is going to include something that is not, I should want an opportunity to cross-examine him.

Mr. Glasgow: I mean from something that is in his possession.

Mr. Jacoby: I could not avail myself of the prices which existed from January to April, 1905, because of the few orders I had in my books, I could not fill them, and therefore my average price that is shown is much lower than the actual market price was during that period.

Examiner Brown: Was that the period during the anthracite strike?

Mr. Jacoby: No, it was after that.

Mr. Glasgow: Of course, if there is anything in that statement Mr. Gowen wants to recall Mr. Jacoby on, he can do so.

Examiner Brown: Yes.

Mr. Jacoby: Coal at that time brought as much as $1.60 to $1.75. I had a few little contracts at $1.25 on my books, which I could not fill, and therefore could not avail myself of the price offered then. I have not said anything in my statement about that, but that is the fact.

Mr. Glasgow: When you bought the mine, or the leasehold there for $25,000, you just got the mine and the equipment that was there at that price, did you not?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: When you turned over the mine and $32,500, did there go with that mine any contracts which you had, or any other matters?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: What went with it over and above what you bought?

Mr. Jacoby: All the contracts and the business belonging to the mine, together with my office furniture and good will.

Mr. Glasgow: And were you to continue as salesman for the output?

Mr. Jacoby: I became interested then in Clark Brothers & Jacoby, Incorporated, and held a fourth interest in that company, who were the company that purchased the mine.

Mr. Glasgow: What do you mean by the good will? It looks to me like there was not much good will there.

Mr. Jacoby: Well, whatever little there was went with it.

Mr. Glasgow: I wondered whose good will you had? That was something I could not exactly grasp.

Examiner Brown: Explain what you mean.

Mr. Jacoby: Well, whatever business I had, not only in connection perhaps with this particular mine, but everything that belonged to the office.

Mr. Boulton: Explain that during several years this coal had obtained considerable reputation on account of its purity, had it not?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: You did not mean the good will of the railroad company, did you?

Mr. Jacoby: No, indeed.

Mr. Glasgow: I believe you have explained it sufficiently. I will not go further.

Mr. Jacoby: Yes, sir. I used the term the same as it would be used in any ordinary business transfer.

Examiner Brown: This is the same seam—you were mining the D vein, were you?

Mr. Jacoby: Yes.

Examiner Brown: That is the same vein that was mined by the Bulah Coal Company?

Mr. Jacoby: Yes, sir.

Examiner Brown: The same character of coal is got out there?

Mr. Jacoby: Yes.

Examiner Brown: Have you ever mined the C vein there?

Mr. Jacoby: No.

Examiner Brown: Do you own that?

Mr. Jacoby: No. It is also the same as Berwind's vein.

Examiner Brown: That is, up there it is what is called thin vein mining, is it not?

Mr. Jacoby: Yes, it could be termed that, as thin vein, that is, as compared with the Pittsburgh district

Examiner Brown: That is to say, it is from 3 to 3½ feet?

Mr. Jacoby: From 3 to 3½ feet, we had in Falcon No. 2 mine.

Mr. Glasgow: You have shown here that the railroad rated your mine at 450 tons a day?

Mr. Jacoby: Yes.

Mr. Glasgow: Tell the Examiner whether you would have had any difficulty in disposing of that coal.

Mr. Jacoby: Absolutely not.

Mr. Glasgow: You were having demand for it all the time?

Mr. Jacoby: I had more demand for the coal than I could supply, because on account of its good quality and the advertising I had done on the coal, and the high reputation it had.

Examiner Brown: You have no complaint because of the rating? The rating was satisfactory?

Mr. Jacoby: Well, yes.

Examiner Brown: The rating given the mine was your own rating?

Mr. Jacoby: It was satisfactory, so far as that is concerned.

Examiner Brown: That is, you consider the rating that they gave you in comparison with the other mines along the Moshannon branch was reasonable?

Mr. Jacoby: Well, I would not like to say that. The rating so far as Falcon No. 2 was concerned, was satisfactory to me in this way; that is, if I felt satisfied at the time that the other mines were rated correspondingly, I will say that that would have been all right.

Examiner Brown: But you do charge that some of the other mines were rated better?

Mr. Jacoby: I do believe that some of the other mines were largely overrated.

Examiner Brown: Well, name one.

Mr. Jacoby: Well, take, I have a small instance, one I happened to be in contact personally, and I will name that, the McGee Coal Mining Company at Osceola. I happened to buy that coal or a great portion of it on the outside, and they told me that they had a rating of 200 tons a day when I started to buy coal of them. I afterwards confirmed that, asking Mr. Freeman, or I think I asked Mr. Trump's office what it was, and they confirmed the statement that the rating was 200 tons a day. I went up there one day and happened to stop at the mine, and coal was coming out very slow, and I asked the mine foreman what their actual capacity was, and he said the actual capacity there was but 75 tons per day, and that that was all they could possibly do.

Mr. Jacoby: Are there any others?

Mr. Jacoby: I have never made any personal investigation of the others.

Mr. Glasgow: We will not go into the question in this case of the rating of the mine. We stand on the rating that we have, 450 tons, because it is such a tremendous subject and involves the examination of every mine in the district, that we cannot go into it at this time. That is all.

Examiner Brown: Very well.

Mr. Glasgow read the testimony of M. Trump, as follows:

"M. Trump, called as a witness, duly sworn, testified as follows:

Direct Examination.

Mr. Glasgow: You are the general superintendent of the Pennsylvania Railroad?

Mr. Trump: Of transportation.

Mr. Glasgow: Superintendent of Transportation?

Mr. Trump: Yes, sir.

Mr. Glasgow: What division or district for car distribution is this Falcon No. 2 mine in?

Mr. Trump: The Tyrone division.

Mr. Glasgow: That is one of the divisions for car distribution, is it not?

Mr. Trump: Yes, sir.

Mr. Glasgow: Where is the point of connection of the Tyrone division with the main line of the Pennsylvania Railroad, where it gets its cars that are coming back into the territory?

Mr. Trump: At Tyrone.

Mr. Glasgow: And you make the distribution at that point for the Tyrone division?

Mr. Trump: Yes, sir.

Mr. Glasgow: I suppose as cars go west, when they get to Tyrone, they are taken out, such proportion of them as you direct to be assigned to the Tyrone division?

Mr. Trump: Yes, sir. I do not make that assignment, it is done by the General Superintendent, but that is the method of doing it.

Mr. Glasgow: How many other divisions for car distribution are there on your road?

Mr. Trump: Eight.

Mr. Glasgow: The entire road makes nine, does it not?

Mr. Trump: Yes, sir, I think that is correct.

Mr. Glasgow: Could you name them?

Mr. Trump: Yes, sir. I had better get that accurately. I think there are eight.

Mr. Gowen: I suppose, of course, Mr. Glasgow is confining his inquiries to the period of the action. I do not know whether there is any change or not.

Mr. Glasgow: Yes, I mean April 1, 1904.

Mr. Trump: That is correct, there are eight others.

Mr. Glasgow: Will you please name them?

Mr. Trump: We have the South Fork, the East End of the Pittsburgh division, we call it the East End, or Mountain division, the West End of the Pittsburgh division, the West Penn Monongahela, Pennsylvania & Northwestern, Allegheny, the Cambria and Clearfield, and the Tyrone.

Mr. Glasgow: Under whose orders at the time I speak of, from April 1, 1904, to October 15, 1905, were the cars assigned to these various divisions?

Mr. Trump: By the General Superintendent at Altoona.

Mr. Glasgow: Was a record kept of that general assignment day by day, of the divisions?

Mr. Trump: Not exact as shown on the sheets of the various divisions.

Mr. Glasgow: There was no sheet covering the whole, was there?

Mr. Trump: There was no sheet made up covering the absolute assignment.

Mr. Glasgow: Is there any record from which, take the first of April, 1904, is there any record of the Pennsylvania Railroad Company by which you can show how many cars there were assigned for distribution to that division on that day?

Mr. Trump: Nothing except the sheets for all the divisions for that day.

Mr. Glasgow: Could you give us a statement for the cars for distribution for each day, covering the period of this complaint?

Mr. Trump: It would have to be made up from the total sheets.

Mr. Glasgow: Have you ever had it made up?

Mr. Trump: I think we had it made up.

Mr. Glasgow: Could you furnish us with that information?

Mr. Trump: I do not think it was by periods.

Mr. Glasgow: Sir?

Mr. Trump: It was made up by an audit company for six years.

Mr. Glasgow: And covers the period of this complaint?

Mr. Trump: Yes, but I cannot confine it to that period of your complaint.

Mr. Glasgow: No, but I mean it embraces that in the six years?

Mr. Trump: Yes.

Mr. Glasgow: Could you let us have that information instead of our going to the distribution sheets and working it out?

Mr. Trump: I think we could furnish that.

Mr. Glasgow: Could you now, Mr. Gowen?

Mr. Gowen: I would have to look it up to see if it came anywhere near that period. What period was covered by the audit company?

Mr. Trump: Six years.

Mr. Gowen: From when?

Mr. Trump: 1900 to 1905, inclusive.

Mr. Glasgow: You see, that would cover the period. Now then, Mr. Trump, during the time that I mentioned, from April 1, 1904, to October 15, 1905, you had in service on your road a number of individual cars?

Mr. Trump: Yes.

Mr. Glasgow: And some of those cars were in service on the Tyrone division, were they not?

Mr. Trump: Yes, sir.

Mr. Glasgow: And they were assigned to the miners of the mines without charging them with those cars, were they not?

Mr. Trump: Yes, sir.

Mr. Glasgow: At that time there were foreign fuel cars in service on the Tyrone division which were not charged against the parties using them; is not that true?

Mr. Trump: I cannot say whether all of that time or not.

Mr. Glasgow: Well, during a part of that time?

Mr. Trump: After a certain date we charged the cars in that way, and there was a notice issued.

Mr. Glasgow: Was not that January, 1906?

Mr. Trump: I think it was earlier than that.

Mr. Glasgow: It was not as early as the 15th of October, 1905, was it?

Mr. Trump: I think I can get you that exact date if you want to have it.

Mr. Glasgow: Yes, I am just trying to get the general phase of this.

Mr. Trump: It was March 28th, 1905, when we placed the foreign fuel cars in the same category as our own.

Mr. Glasgow: The same category as your own fuel cars?

Mr. Trump: Yes, as our own fuel cars.

Mr. Glasgow: What was the status at that time as to them?

Mr. Trump: They were not counted in the distribution.

Mr. Gowen: What do you mean by at that time? Do you mean prior to March 28, 1905?

Mr. Trump: Prior to March they were.

Mr. Gowen: They were counted as a commercial car was counted, do you mean?

Mr. Trump: They were counted as a commercial car prior to March 28th, 1905.

Mr. Gowen: And after that they were treated as our own fuel cars were treated?

Mr. Trump: After that they were put in the same class.

Mr. Glasgow: Suppose we just read this on the record.

"Pennsylvania Railroad
Company.

Philadelphia, Baltimore & Washington Railroad,
Northern Central Railway,

West Jersey & Seashore Railroad,

Office of the General Superintendent of
Transportation.

Philadelphia, January 14th, 1903.

General Notice to Shippers of Bituminous Coal.

Taking effect February 1st, 1903, the following rules will govern the distribution of cars to coal mines located on the Pennsylvania Railroad Lines east of Pittsburg and Erie.

1. All railroad cars, regardless of ownership, and private cars not owned by the party loading them, will be considered as applying on the pro rata distribution to each mine.

2. Cars placed by the Pennsylvania Railroad Company for its coal supply will be considered as additional to the pro rata allotment and must be used only for such shipments. If otherwise used they will be subject to reconsignment to this company.

M. Trump,
General Superintendent of Transporation."

"Pennsylvania Railroad Company.

Philadelphia, Baltimore & Washington Railroad.
Northern Central Railway,

West Jersey & Seashore Railroad.

Office of the General Superintendent of Transportation.

Philadelphia, March 28th, 1905.

General Notice to Shippers of Bituminous Coal.

Taking effect April 1st, 1905, the following rules will govern the distribution of cars to coal mines located on the Pennsylvania Railroad Lines east of Pittsburg and Erie.

1. All railroad cars regardless of ownership, except as specified in the next paragraph hereof, and also all private cars owned by the party loading them will be considered as cars for distribution to mines in the several districts.

2. Cars placed by the Pennsylvania Railroad Company for its coal supply, and empty cars of other railroad companies for their coal supply, delivered to the Pennsylvania Railroad Company and specially consigned under specific arrangements between the Companies, will not be subject to distribution and allotment, but must be used exclusively for the special purpose designated.

M. Trump,
General Superintendent of Transporation.

Approved:
W. W. Atterbury,
General Manager."

"Pennsylvania Railroad Company.

Philadelphia, Baltimore & Washington Railroad.

Northern Central Railway.

West Jersey & Seashore Railroad.

Office of the General Superintendent of Transportation.

Philadelphia, January 1st, 1906.

General Notice to Shippers of Bituminous Coal.

In accordance with a circular letter issued to Shippers of Bituminous Coal in June last, the ratings of bituminous coal mines located in the following regions have been carefully revised and the new ratings have been put in effect:

Tyrone,
Pennsylvania & Northwestern,
Cambria & Clearfield,
Pittsburgh Division, East End, and
South Fork and Scalp Level.

Revised ratings for bituminous coal mines in the following regions will be put in effect on an early date:

Pittsburgh Division, West End,
West Penn., and
River and Low Grade Divisions (A. C. Ry.).

Commencing January 1st, 1906, assigned cars, i. e., cars for Pennsylvania Railroad fuel supply, foreign railroad cars specially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specify mines for loading, will be charged against the capacity of the mines at which they are placed, the difference between the rated capacity of a mine

and the capacity of the assigned cars placed for loading will be rated capacity on which all other cars will be pro rated.

M. TRUMP,
General Superintendent of Transportation.

Approved:
W. W. ATTERBURY,
General Manager."

Mr. Glasgow: Then as I understand, these foreign fuel railroad cars and the fuel of those companies when specially consigned to a mine, were not charged against the mine?

Mr. Trump: No.

Mr. Glasgow: After March 28th, 1905?

Mr. Trump: No.

Mr. Glasgow: Prior to that they were charged against the mine?

Mr. Trump: They were treated as pro ratable or commercial cars.

Mr. Glasgow: But were they as a matter of fact charged against the number of cars to which the mine was entitled?

Mr. Trump: No.

Mr. Glasgow: Were your own fuel cars charged against the mine using them prior to that time?

Mr. Trump: No.

Mr. Glasgow: And prior to that time the private cars owned by the party loading them were not charged against them?

Mr. Trump: No.

Mr. Glasgow: Did you rate the several divisions of this road and assign to each division a percentage of the cars for distribution?

Mr. Trump: There was no assignment of cars made.

Mr. Glasgow: The distribution to the divisions as I understand it, was an arbitrary distribution made—I mean in no invidious sense—but it was an arbitrary division made in accordance with what some officer who had charge of it may have thought was the proper distribution to make?

Mr. Trump: No.

Mr. Glasgow: How was it made?

Mr. Trump: Made daily by the general superintendent according to his demands in the region, cars already in the region and cars moving toward the junction point, in the various divisions.

Mr. Glasgow: Was it made in accordance with his views as to the demands of the service?

Mr. Trump: Yes, sir.

Mr. Glasgow: And not based upon the previous shipments or any percentage basis?

Mr. Trump: Well, if you would like me to explain that as best I can, I would be glad to do it.

Mr. Glasgow: Yes, I would be glad to have you.

Mr. Trump: In the first place, the car distributor has the rating of the various regions, and he knows about the approximate number of cars that are to go into each out of the total he has in sight on any one day. Now, there are cars already in the regions that he gets reports from, his train masters in the morning, and also the cars of the shippers, so far as he can compile them, and he says we have so many cars and we want so many more. The car distributor at Altoona takes from his records of the trains running generally west of Harrisburg, the various classes of cars. Those are already shown on detailed sheets. The classifications are made by distance very largely, that is, certain individual cars go to certain districts, and those classifications are made at Harrisburg, and when a train leaves Harrisburg the man at Altoona knows whether it ought to go on through from Altoona,

or whether it has cars for the Tyrone district. Then there are classifications made of steel cars and wooden cars, and those he picks off here and there and puts them into the various regions as best he can. Sometimes, and very frequently, the Tyrone region uses cars that would not be available to some region farther beyond, and they were put in there so as to get them loaded as promptly as possible. There was no definite instruction or no definite rule as to the distribution of cars between regions. It must be done daily in accordance with the circumstances.

Mr. Glasgow: During this period we have under investigation here, or part of it, at least, was there not some rule by which Berwind-White & Company received, or it was ordered that they should receive 500 cars a day, without it being charged against their percentage?

Mr. Trump: No, there was a rule, that in times when they had not sufficient cars on the road to keep their steamer contracts in New York going, that we endeavored to give them the full capacity of their mines in the South Fork region, which was namely about 250 steel cars, what we call equal to 500 wooden cars.

Mr. Glasgow: That was the order that was issued, that they were to have that amount, 500 wooden cars, or 500 cars, it was not specified.

Mr. Trump: Yes. It was not a standard order; it meant that that included also their own cars.

Mr. Glasgow: That was the standard order?

Mr. Trump: Yes, it took those cars daily to keep enough coal running to Harsimus for that steamship business.

Mr. Glasgow: It was done for the purpose of enabling them to load their steamers promptly at Harsimus?

Mr. Trump: Yes.

Mr. Glasgow: The Pennsylvania Railroad Com-

pany has kept a record of the distribution to the individual mines on the Tyrone divison each day, of the cars which were assigned to that division?

Mr. Trump: Yes, sir.

Mr. Glasgow: And you could show from those sheets the cars on the Tyrone division each day and the individual mines to which that aggregate number was assigned?

Mr. Trump: Yes.

Mr. Glasgow: Are those sheets here?

Mr. Trump: Yes.

Mr. Glasgow: Then we can examine them at our leisure, I suppose?

Mr. Trump: Yes.

Mr. Gowen: Yes.

Mr. Glasgow: Can we make some arrangement by which we can copy them?

Mr. Gowen: Yes, if you will send someone up to Mr. Trump's office he would be very glad to let you look at them.

Mr. Trump: What do you want to work out?

Mr. Glasgow: We want to see if we cannot work out during the period covered by this complaint the cars which were assigned for that division and what number of them we got, and then we want to know the aggregating rating in the territory and work out our percentage of that rating. Now, that we think can be done, and if you have any figures that will help us to do it, it will save time and trouble to you and to us.

Mr. Trump: We have them, if Mr. Gowen wants to submit them at this time."

Mr. Glasgow: The next witness is Mr. O. A. Knipe. I do not think it is very material, and I will not read it at this time. If there is anything there that Mr.

Gowen or myself desires, it can be read. It is offered in evidence, but not read now.

(The testimony of O. A. Knipe, which was not read to the jury, is as follows:

O. A. KNIPE, called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Glasgow: What is your occupation?

Mr. Knipe: Auditor coal freight receipts, Pennsylvania Railroad Company.

Mr. Glasgow: Are you able to give us from any records that you have, or would you be able to do so, a statement showing the percentage of coal from the Tyrone division carried by the Pennsylvania Railroad during the period from April 1st, 1904, to October 15th, 1905?

Mr. Knipe: No, there is nothing. I have no statement of that.

Mr. Gowen: What is that?

Mr. Knipe: I have no statement.

Mr. Glasgow: I ask you if there is any record from which that can be made?

Mr. Knipe: Yes.

Mr. Glasgow: There is such a record?

Mr. Knipe: Yes, sir.

Mr. Glasgow: Does that record show the shipments carried from that division daily, of coal?

Mr. Knipe: No, sir.

Mr. Glasgow: Does it show monthly?

Mr. Knipe: Yes, sir.

Mr. Glasgow: Do your records show the proportion of that carried from each colliery on that division?

Mr. Knipe: Not precisely. The record that we have is a record that is made up in order to determine

the tonnage mileage so the question that is considered in preparing that record is how many miles is the coal carried on the Tyrone division. So for two collieries for the same distance they would be grouped together. The collieries are not separated. It is so many tons carried so many miles.

Mr. Glasgow: What I am trying to get at is this. We can find out, as I understand, from your records, the monthly tonnage from the division?

Mr. Knipe: Yes, sir.

Mr. Glasgow: Is there any way by which you can work out from your records, what the proportion of that monthly tonnage so shipped by each shipper along the line, was?

Mr. Knipe: I have no such record prepared.

Mr. Glasgow: I know, but could it not be done?

Mr. Knipe: It could, from the waybills.

Mr. Glasgow: From the waybills?

Mr. Knipe: Yes, sir.

Mr. Glasgow: That would be a considerable job to make it up from the waybills?

Mr. Knipe: That would be very troublesome. Perhaps I might be allowed to explain.

Mr. Glasgow: Yes.

Mr. Knipe: You see, my work is accountant's work, and to the accounting department who a shipper is or who a consignee is, is a matter of no consequence whatever. We keep our records so as to show how many cars are carried from such a place to such a place, how many miles it is carried, and we have no further interest in it. After a shipment is received and after it is delivered, there is no further interest taken in the consignee or shipper.

Mr. Glasgow: I suppose there is some other department from which we could get the record as to what was the tonnage of the coal operators in that district, covering the same days?

Mr. Knipe: I doubt it.

Mr. Glasgow: Is not the report made to you from the Tyrone scales?

Mr. Knipe: I know the Tyrone scale weighs the cars as they come up from the operation; then he has a card giving the shipper, to whom it is consigned, and giving the necessary directions as to the movement of the car. Then he writes out what we call a manifest or way bill, which shows where the coal originated, who was the shipper, to whom it was consigned and all the information as to the rate and everything else. That original way bill is copied in the office of the Tyrone scales, and the original way bill goes to the junction or destination, and the first press copy comes to me, and other copies may go, for instance, off to a connecting line, to the auditor of the connecting line, or to a junction of way station, if necessary. But my record is made from the way bills and not from a record of weighing, or anything of that kind.

Mr. Glasgow: Don't you get each month a recapitulation from the Tyrone scales of those way bills?

Mr. Knipe: No, sir. Well, perhaps in one way you might say so. Suppose there is prepaid freight. The agent at Tyrone must be charged with the amount of money that he collects. At the end of the month he gives me the amount of money that he collects. At the end of the month of money that he would give me nothing else but that. I make up the totals. He does not, so far as tonnage is concerned.

Mr. Glasgow: Does not a somebody get a monthly or weekly statement of all the way bills from the Tyrone scales?

Mr. Knipe: A monthly or weekly statement of way bills?

Mr. Glasgow: Yes. I should think somebody would have to have a statement of the coal tonnage passing

the scales at Tyrone. At least I would not think that that gap would be left——

Mr. Knipe: There is not any gap left. Where is the gap?

Mr. Glasgow: You do not misunderstand me, I do not mean anything improper by a gap.

Mr. Knipe: No, but I wanted to know what your gap was.

Mr. Glasgow: I should think somebody would want to know how much tonnage and by whom it was shipped, was shipped past the Tyrone scales.

Mr. Knipe: I am the man who has the records.

Mr. Glasgow: Is there no way you can tell how much a mine is shipped on your road during a year?

Mr. Knipe: When such a statement is asked for, I have to make it up from way bills. It sometimes is asked for.

There will be a question; and within I should say two years we have regularly made statements of shipments from the mines. But at that time in 1904 there was no such statement made.

Mr. Glasgow: Here is what I mean. For instance, you take this, each one of these mines in that territory is rated at a certain capacity by the Pennsylvania Railroad for shipments. Now, in order to rate those mines, they must have something to show what have been the previous shipments from the mine. Now, there must be some record somewhere to which they can go to show what the mine has been shipping prior to that time, whether it is the scales or what.

Mr. Knipe: Perhaps Mr. Trump may know of such record.

Mr. Trump: We have that worked up since 1906, since we commenced to rate mines in this way. The only trouble is we do not have it prior to 1906.

Mr. Glasgow: Mr. Knipe, do you think you could give us a statement showing the total tonnage monthly

—I believe you said it was made up monthly—from the Tyrone division, from April 1st, 1904, to October 15th, 1905?

Mr. Knipe: That statement could be made up from the books I have here.

Mr. Glasgow: It could be made up with very little difficulty, could it not?

Mr. Knipe: It would take quite a little time to do it.

Mr. Glasgow: Do you think you could make it up, or have somebody make it for us from your books, or allow us to make it up from your books?

Mr. Knipe: I have no objection.

Mr. Gowen: Is it made up there month to month?

Mr. Knipe: No, it shows from each of these shipping stations in the Tyrone division that are all of a certain mileage. For instance, the first one, I think, is eight or nine miles; it is marked Tyrone Division No. 8. Now, all the shipments in this period that are eight miles from Tyrone are grouped there month by month.

Mr. Glasgow: Have you got a recapitulation at the end of the month showing the shipments from the Tyrone division?

Mr. Knipe: Unfortunately not. It happens that the Tyrone division in 1903 was incorporated with the Cambria & Clearfield division. I think it was in August, 1903. And then instead of keeping the Tyrone division totals separate for the month, it was put in along with the Cambria & Clearfield, so that that whole thing shows in one total, and that was continued until a date in 1906, I should say about May, and afterwards our people said that for their purposes, for the superintendent's benefit, I think, I was directed to separate the Tyrone division again.

Mr. Glasgow: When was that?

Mr. Knipe: Some time in 1906.

Mr. Glasgow: So if we send to your office a bookkeeper he can get the books and from them work out what were the monthly shipments on the Tyrone division?

Mr. Knipe: Yes, those books I have brought here also.

Mr. Glasgow: I want to know whether you can let us have that statement of the tonnage monthly, or if you have such a statement made up, or whether you will permit us to make an investigation of the books?

Mr. Knipe: I think that is for counsel to settle as to who shall make it up.

Mr. Gowen: Would you rather make it up, considering the work you are doing up there, or would you rather have Mr. Glasgow send somebody up to compile it?

Mr. Knipe: I really have as many statements to make up in the course of ordinary work, particularly at this time of the month as I should care to undertake.

Mr. Gowen: You had better send somebody up.

Mr. Glasgow: I will send somebody up to call on you if you will permit me, to see what he can make out of it.

(Witness excused.)"

Mr. Glasgow read the testimony of Fred B. Lott, as follows:

"FRED B. LOTT, called as a witness, and being duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Glasgow: Did you make up a statement of the tonnage during October, 1902, of the Falcon No. 2 mine, and the cost of production of a ton of coal?

Mr. Lott: It was made up under my supervision in my office.

Mr. Glasgow: I hand you herewith a statement and ask you whether that was made up from the books of the company that was operating the mine?

Mr. Lott: Yes, sir; I identify that as a statement made up from the books of the Penn Collieries Company.

Mr. Glasgow: We offer this. The cost of coal during October, 1902, and subdivisions of the cost of Falcon No. 2. In this statement are embraced Falcon No. 1 and Falcon No. 3, but we offer Falcon No. 2, because it is the only one applicable.

(The paper was received in evidence and marked "Complainant's Exhibit No. 9," attached to Mr. Lott's testimony.)

Mr. Glasgow: That is all.

(No cross-examination.)

(Witness excused.)"

Mr. Glasgow read the testimony of James R. Rettew, as follows:

"James R. Rettew, called as a witness, and being duly sworn, testified as follows:

Direct Examination.

Mr. Glasgow: Did you make up this average cost of coal, Exhibit No. 3, from April 1st, 1904, to April 1st, 1905, of the W. F. Jacoby Company at Falcon No. 2 mine?

Mr. Rettew: Yes, sir; I worked that out.

Mr. Glasgow: I notice here, or Mr. Gowen calls attention to the fact that for May, 1904, in that statement the royalty is put at .14967 cents, and for February, 1905, it is put royalty at .21123 cents. Why is there that difference in royalty as between May, 1904, and February, 1905?

Mr. Rettew: I do not remember those old statements. I made all the cost statements up for W. F. Jacoby & Company every month, but my impression is in that particular instance there was a back royalty that we had to make up, and for some cause it was added in, with that one month.

Mr. Glasgow: What I wanted to understand was why there was any increase in the per ton royalty?

Mr. Rettew: Well, it was a claim for back royalty that was made by the lessors of the mine.

Examiner Brown: I want in a general way, as the papers are not in evidence, that we may have general statements to which Mr. Gowen may agree, to appear for the purpose of a statement of the case when it comes to be decided by the Commission. How many acres of land had Jacoby & Company under that lease?

Mr. Rettew: The original lease was about 130 acres.

Examiner Brown: Why do you say original lease? Was there a subsequent lease?

Mr. Rettew: No, but he did not acquire the property until after it had been operated for two years.

Mr. Glasgow: Do you mean some part of the coal had been mined out?

Mr. Rettew: Some part of the coal had been mined out in the meantime.

Examiner Brown: Some part of the coal had been mined out in the meantime.

Examiner Brown: About how much coal was there in that property covered by the lease approximately at the time Jacoby & Company acquired it and began mining it, within the dates named, or the dates in question here?

Mr. Rettew: I imagine there must have been about 100 acres, although I do not say that from any positive knowledge.

Examiner Brown: That is your estimate?

Mr. Rettew: Yes, sir.

Examiner Brown: That there were about 100 acres?

Mr. Rettew: Yes, I think possibly a little more.

Examiner Brown: When they began in 1914?

Mr. Rettew: Yes, sir; I rather imagine that the mining maps would show that closer.

Mr. Gowen: Do you know as a matter of fact how much of this 130 acres was underlaid with the vein that was leased?

Mr. Rettew: It was supposed to all be.

Mr. Gowen: But you do not know positively?

Mr. Rettew: I do not know positively, no.

Mr. Gowen: Do you know how much the Penn Collieries Company had mined, the original lessee?

Mr. Rettew: That is the way I base my figures. I think the amount mined was in the neighborhood of 70,000 to 80,000 tons.

Mr. Glasgow: You would estimate on that thickness of vein about 4000 tons to the acre?

Mr. Rettew: No, I would estimate about from 3000 to 3500 tons an acre.

Mr. Glasgow: I will ask Mr. Jacoby if he made any estimate of the amount of coal which was there when he took the lease on April 1st, 1904?

Mr. Jacoby: I estimated there were 400,000 tons and over, at that time, between 400,000 and 500,000 tons.

Mr. Glasgow: What was your position, Mr. Rettew, in connection with this business?

Mr. Rettew: With W. F. Jacoby & Company?

Mr. Glasgow: Yes.

Mr. Rettew: Bookkeeper.

Mr. Glasgow: That is all I want to ask him. We will put on the record a description of the leased property. The recital is in a deed dated the 31st of March, 1904, between the Penn Collieries Company and W. F.

acoby; recorded Clearfield County, April 14th, 1904, hich sets forth the lease under which W. F. Jacoby & ompany operated as covering all the estate, right, tle and interest under an agreement made on the 5th of December, in 1900, by and between Annie J. oot and others, and the Forest Coal Mining Company, which agreement is duly recorded in the office f the Recorder of Deeds for Clearfield County in liscellaneous Book R, page 213. The lease covered a rm of ten years from the second day of September, 01, with privilege of renewal upon like terms and onditions for succeeding term, and giving the exclue right and privilege of entering upon and taking erefrom during the term for its exclusive use and enefit all the coal in the Moshannon seam underlying at certain tract or piece of land situated in the townip of Gulich, county of Clearfield, Pennsylvania, conaining 130 acres more or less, and which land comrises the colliery operation of Falcon No. 2.

Is that the lease, Mr. Jacoby, under which you ent into operation on the 1st of April, 1904?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: I want to ask Mr. Miller a few questons."

(Mr. Glasgow read the testimony of J. H. Miller, as follows):

"J. H. Miller, called as a witness, and being duly vorn, testified as follows:

Direct Examination.

Mr. Glasgow: Were you employed by W. F. Jacoby Company at the time they were operating under the ase at Falcon No. 2?

Mr. Miller: Yes, sir.

Mr. Glasgow: From April 1st, 1904, to October 15th, 1905?

Mr. Miller: Yes, sir.

Mr. Glasgow: What is your position?

Mr. Miller: Superintendent.

Mr. Glasgow: Superintendent of the mine?

Mr. Miller: Yes, sir.

Mr. Glasgow: Falcon No. 2?

Mr. Miller: Yes, sir.

Mr. Glasgow: Whose duty was it to order cars for the output of that mine?

Mr. Miller: It was my duty.

Mr. Glasgow: Was it your duty during the whole period I have spoken of from April 1st, 1904, to October 15th, 1905?

Mr. Miller: Yes, sir.

Mr. Glasgow: How did you order those cars?

Mr. Miller: I usually ordered them by mail.

Mr. Glasgow: Addressed to whom?

Mr. Miller: John K. Johnston, at Tyrone.

Mr. Glasgow: What was his position?

Mr. Miller: Superintendent of the Tyrone division. And there may be some times that I ordered them by telephone.

Mr. Glasgow: Can you tell us whether or not you ordered cars every day?

Mr. Miller: To the best of my knowledge and belief they were ordered every day.

Mr. Glasgow: Either by mail or by telephone?

Mr. Miller: Either by mail or by telephone. Now I will put a proviso in there; sometimes they were ordered by telephone from Mr. Wingate at the dispatcher's office at Madeira Junction, which is two miles from Falcon No. 2, that is the dispatcher's office for the Marbauman & Maderis branch.

Mr. Glasgow: Who was the gentleman you ordered them from there?

Mr. Miller: C. B. Wingate.

Mr. Glasgow: Did he have charge of the distribution there?

Mr. Miller: He generally, when we ordered by telephone from him, he would report to Mr. Johnston; but it was not very often we did it that way.

Examiner Brown: You speak of Madeira Junction; what is that? Does it join with another branch of the road?

Mr. Miller: The only branch which is there is a siding going up to Webster No. 4, but they have a telegraph office and all the trains from Osceola to McCartney are run from this office. It is the dispatcher's office for the Moshannon & Madeira branch of the Tyrone division.

Mr. Glasgow: You were there operating the mine Falcon No. 2?

Mr. Miller: Yes.

Mr. Glasgow: During that time would you have been able to get out 450 tons of coal a day if you had the cars?

Mr. Miller: Yes, sir; that is if we had had a regular and continual supply of cars so as to increase our force of men, we could have done it.

Mr. Glasgow: Was there any time at which you did get out as much as 450 tons a day?

Mr. Miller: Not during that period, but prior to that period we got out more than 450 tons in a single day.

Mr. Glasgow: You had been operating there prior to the time that W. F. Jacoby & Company took charge?

Mr. Miller: Yes, sir; I was employed by the Penn Collieries Company prior to W. F. Jacoby & Company.

Mr. Glasgow: You say that prior to April 1st, 1904, during your superintendence, that you had gotten out more than 450 tons a day?

Mr. Miller: Yes, sir.

Mr. Glasgow: How did the development at the mine Falcon No. 2 on April 1st, 1904, and subsequent thereto, compare with the state of the mine at the time you got out the 450 tons a day?

Mr. Miller: There was more development.

Mr. Glasgow: After April 1st, 1904?

Mr. Miller: After April 1st, 1904; yes, sir.

Mr. Glasgow: At and after?

Mr. Miller: Yes, sir.

Mr. Glasgow: And was your mine equipped properly or not?

Mr. Miller: Yes, sir; it was.

Mr. Glasgow: Did you have sufficient equipment there to have taken care of that quantity of coal?

Mr. Miller: Yes, sir.

Mr. Glasgow: Mine cars?

Mr. Miller: Yes, sir.

Examiner Brown: What was your tipple capacity?

Mr. Miller: One thousand tons; Phillips automatic tipple.

Examiner Brown: You had a Phillips automatic tipple?

Mr. Miller: Yes, sir.

Examiner Brown: The frame was of wood?

Mr. Miller: Yes, sir.

Examiner Brown: You simply had the one dump or one tipple?

Mr. Miller: Yes, sir; that is all.

Examiner Brown: You did not dump from both sides?

Mr. Miller: No.

Examiner Brown: You sent your coal down by an inclined plane?

Mr. Miller: No, sir; tram road.

Examiner Brown: It came right down by tram road?

Mr. Miller: Yes, sir. The electric locomotive hauled it from inside the mine right down on the tipple.

Mr. Glasgow: Was the grade in favor or against the load?

Mr. Miller: In favor of the load.

Mr. Glasgow: And the mine drained to the mouth?

Mr. Miller: Yes, sir.

Mr. Glasgow: What was the weight of the rails on your tram road?

Mr. Miller: Twenty-pound iron.

Mr. Glasgow: The hauling was electrical?

Mr. Miller: Yes, sir.

Mr. Glasgow: You had sufficient motor power?

Mr. Miller: Yes, sir.

Examiner Brown: How did you air your mine?

Mr. Miller: By a fan.

Examiner Brown: Your fan was run by electric power?

Mr. Miller: By a steam engine.

Examiner Brown: It was not part of the plant that operated the tram?

Mr. Miller: No; it was separate altogether. It was 250 away from the power plant. We had one power engine and one fan engine.

Examiner Brown: What was the horse power of your electrical dynamo?

Mr. Miller: Fifty kilowatts.

Examiner Brown: What does that mean?

Mr. Miller: A kilowatt, the unit of electricity is a watt, and a kilowatt is 1000 watts, which is equal to 1 1-3 horse power. That would make the rated capacity of the machine 63 horse power; but the machine is guaranteed at an overload of 40 per cent., which would really make it, say, in the neighborhood of say 73 horse power.

Examiner Brown: I do not know whether the record shows it or not, but take it all together, what was that plant as it lay at the time W. F. Jacoby & Company acquired the lease, worth approximately?

Mr. Miller: It inventoried in the neighborhood of $30,000, that is approximately.

Mr. Glasgow: Do you know where the Banian coal operation is?

Mr. Miller: Yes, sir.

Mr. Glasgow: Where is that?

Mr. Miller: On the Chesterfield branch.

Mr. Glasgow: How far from your plant?

Mr. Miller: In a direct course, probably a mile and a quarter.

Mr. Glasgow: Is it on the Tyrone division?

Mr. Miller: Yes, sir.

Mr. Glasgow: Do you know who is interested in that operation?

Mr. Miller: Mr. Beyer, of Smoke Run, and Mr. Cameron, of Philadelphia.

Mr. Glasgow: Do you know what the rated capacity of that operation was?

Mr. Miller: No, sir; I do not.

Mr. Glasgow: Do you know what the distribution sheet shows as to its rated capacity?

Mr. Miller: I think, if I am not mistaken, it is either 50 or 100 tons.

Mr. Glasgow: Standard No. 7 Banian Run Coal Company 100 tons capacity is the rating. (Referring to paper.) Who is Mr. Beyer?

Mr. Miller: He is a merchant there in Smoke Run.

Mr. Glasgow: Is there any conection between that company and Berwind-White Company?

Mr. Miller: Not that I know of.

Mr. Glasgow: Or between the people who are interested in it?

Mr. Miller: Not that I know of.

Mr. Glasgow: Who is the superintendent of the Berwind-White Company?

Mr. Miller: Mr. William Cameron.

Mr. Glasgow: Is he a connection of the Cameron in the Banian Company?

Mr. Miller: I understand they are brothers.

Mr. Glasgow: Brothers?

Mr. Miller: Yes, sir.

Mr. Glasgow: Mr. Miller, I want you to finally tell the Examiner whether with regular or comparatively regular run of cars to that mine sufficient to take care of the output, would you have been able to have taken out and loaded 450 tons per day?

Mr. Miller: Yes, sir. If there was a regular car supply so we could get the men and hold them, we could get out 450 tons every day and more.

Mr. Glasgow: Did you have difficulty with your men leaving?

Mr. Miller: Yes.

Mr. Glasgow: Why?

Mr. Miller: Because the other operations in that neighborhood worked better than we did.

Mr. Glasgow: What do you mean by worked better than you did?

Mr. Miller: They had more cars, and worked more days, and especially during the fall and winter when prices were good, when the operators that had individual cars worked every day, while we were idle so much, and the men would leave us and go to Berwind-White's and some of those other operators that had cars, and would get employment there. It was a common occurrence when you asked a man to work he would say, no, you do not work steady enough; I will go somewhere else where I can get better work.

Mr. Glasgow: Where would they go?

Mr. Miller: To Berwind-White, mostly.

Mr. Glasgow: Was that the shaft mine?

Mr. Miller: No.

Mr. Glasgow: Where?

Mr. Miller: There was one Shaft mine and Eureka No. 27, and No. 26, and both of those were adjacent to our mine.

Mr. Glasgow: They are Berwind-White mines?

Mr. Miller: Yes, sir; and there is also Eureka No. 22.

Mr. Glasgow: I have no further questions.

CROSS-EXAMINATION.

Mr. Gowen: Mr. Miller, have you got with you the copies of the orders which you sent in for cars?

Mr. Miller: I have not, unless Mr. Jacoby has them.

Mr. Gowen: Did you not have them here yesterday?

Mr. Glasgow: We had a number of them here yesterday.

Mr. Gowen: I thought you were going to put them in when Mr. Miller was on the stand.

Examiner Brown: I asked him about that afterwards, and he said he did not think he would put them in.

Mr. Glasgow: I did not want to encumber the record with them.

Mr. Gowen: Mr. Miller, while we are waiting for these to be produced, you say you have been in the Tyrone region for some time?

Mr. Miller: Yes, sir.

Mr. Gowen: What proportion of the mines in that region close down during the summer, should you say?

Mr. Miller: Now that is a pretty hard question for me to answer just here.

Mr. Gowen: I do not mean, of course, accurately, but approximately?

Mr. Miller: There is very seldom that any of them

close down for any long period; it is generally just the work being slack. I think during 1904 Eureka No. 27 was closed down.

Mr. Gowen: Are there not a very large number of small mines in that region that close down during the summer practically?

Mr. Miller: No, sir.

Mr. Gowen: I do not mean the whole summer, but that suspend operations to a large extent during the summer months.

Mr. Miller: It is as a general thing the larger operations that close down more than the small ones. I do not recall an instance of the small mines closing during the summer. There might have been, but I do not recall an instance.

(The papers referred to by Mr. Gowen were produced.)

Mr. Gowen: Are these copies of all the orders you sent in, written requests for cars?

Mr. Miller: They are copies that I sent in, but I cannot say if they are all of them, because I have not the office records. There might be more and might be some of them have not got in here, but they are copies that I made up.

Mr. Gowen: Is there anyone who can tell us?

Mr. Jacoby: That is all we received from the Smoke Run office. Whether they all came down or not I do not know.

Examiner Brown: When you asked for them did you ask for all of them?

Mr. Jacoby: Yes, I believe we did.

Mr. Miller: I think during the month of July there were cars ordered by telephone from Mr. Wingate, and I think there ought to be a letter on record somewhere where I stated that the cars were running fairly well, and I ordered them from Mr. Wingate by tele-

phone for awhile; but it was not long that we ordered them that way.

Mr. Glasgow: The form that the railroad company furnished and that we used have no place for the dates, and therefore we can hardly tell the dates.

Mr. Miller: I do not think it requires the use of that form to order cars.

Mr. Glasgow: Did you ever have any information from the railroad company's office whether they required daily orders for these cars?

Mr. Miller: I did not, not during 1904, I never saw such an order. We received orders subsequently that cars must be ordered every day.

Mr. Glasgow: But prior to that time, had you been told that you need not send in your orders every day?

Mr. Miller: No.

Examiner Brown: Was there any such thing as having a standing order for so many cars?

Mr. Miller: No.

Examiner Brown: That is, you could not say, "we want ten cars every day"?

Mr. Miller: No.

Examiner Brown: You had to order every day?

Mr. Miller: I sent in orders every day to the best of my knowledge and belief.

Examiner Brown: Now, in this connection, as I understand it, you had the ordering of the cars?

Mr Miller: Yes.

Examiner Brown: When you would send down an order by mail and you received no cars, what did you do, what did you say?

Mr. Miller: Just ordered them again next day.

Examiner Brown: Did you not object?

Mr. Miller: I wrote to the Philadelphia office, and they usually took it up with the main office of the railroad.

Examiner Brown: What did the railroad company say, what did they represent to you, either Mr. Johnston or Mr. Wingate or any of those, what did they give as a reason why?

Mr. Miller: They had no cars. That was their cry all the time, "We have no cars" Most of my telephone communications with regard to that were not with Mr. Johnston, because I had no telephone communication with Mr. Johnston's office at that time; and I took it up with the dispatcher at Osceola, and he always attended to that matter, and always said, "We have no cars to give you."

Examiner Brown: During this period covering the time alleged here, you state and it is stated in the petition here that other operations in and around Falcon No. 2 were getting cars regularly, or at least more regularly than your operation. Did you call the attention of the railroad company to that fact?

Mr. Miller: Yes, sir, I have.

Examiner Brown: What did they say?

Mr. Miller: They simply gave me an off answer. I often would tell them, "Berwind has a lot of cars, and they are Pennsylvania cars, or some of them are," "Well, that is Company coal," was their cry. Or if it was not company coal, "Well, we have not got any cars." If you mentioned to them a certain operation had Pennsylvania cars, and we had not any, they would say, "Well, that is company coal. We have got to put those cars there."

Examiner Brown: That is all.

Mr. Gowen: I have no other questions.

Mr. Glasgow: Did you see whether the individual cars were being furnished regularly to the mines around you, Berwind-White Company say?

Mr. Miller: They had individual cars, with the exception of Ramey shaft. Many a time have I went

up there and seen Pennsylvania cars at the Rainney shaft.

Mr. Glasgow: Of the Berwind-White Company?

Mr. Miller: Yes, sir.

Mr. Glasgow: They were also getting individual cars?

Mr. Miller: Yes, sir; but at the Rainey shaft the majority of the cars loaded at that time were Pennsylvania cars.

Mr. Glasgow: When you put in your daily order for cars, how many did you usually order?

Mr. Miller: I ordered anywhere from 400 to 675 tons, hoping thereby——

Mr. Glasgow: You then ordered every day the capacity of your mine?

Mr. Miller: Yes, and more.

Examiner Brown: At this time, I think the record here shows as stated by Mr. Trump, that at least during a part of this time the Berwind-White people were receiving the equivalent of 500 cars a day. Was that it?

Mr. Glasgow: That was an arbitrary allowance.

Examiner Brown: Did you know that?

Mr. Miller: I did not. As I understood from what testimony I heard, that applied to Berwind-White's mines on the main line or division.

Mr. Glasgow: I think it applied to the scalp level division.

Examiner Brown: It did not pertain to this branch?

Mr. Glasgow: No, the pertinency of that was that there are two claims that the Falcon No. 2 did not get the amount it was entitled to, and that the other operations on that line did that. Now, the pertinency of that is that those cars should have been the proper proportion of them, distributed to the Tyrone division, or if Berwind-White Company took them as individual

cars, that other cars should have been used to make up the distribution to the Tyrone division.

Examiner Brown: That is so it would have increased the allowance to the Moshannon branch by that much?

Mr. Glasgow: And the Tyrone division. That was the pertinency of that.

Mr. Gowen: You do not really mean to be understood as saying that every day for this period you ordered cars?

Mr. Miller: During 1904?

Mr. Gowen: Yes.

Mr. Miller: Yes.

Mr. Gowen: Whether your mine was running or not?

Mr. Miller: Yes, sir. I think from the tissues there it will show it, with the exception of during the month of July, I think it was the month of July, as I stated in the letter to the main office, I ordered by telephone.

Mr. Glasgow: Was there any reason for your mine not running except for lack of cars?

Mr. Miller: No, sir; not unless it might be a couple of hours some day on account of accidents.

Mr. Glasgow: But I mean for a day?

Mr. Miller: No, not that I recollect.

Examiner Brown: As a matter of fact, was the mine closed down during this period for any length of time?

Mr. Miller: I think we were closed down for about six days at one time, that was the forepart of June, 1904.

Mr. Glasgow: Why was that?

Mr. Miller: I could not tell you. I just got orders to close down for a few days.

Mr. Glasgow: Outside of Sundays and legal holidays, was there any reason that your mine should not

have run and operated every day during that period, except that you had a lack of cars?

Mr. Miller: No, sir; none whatever.

Mr. Gowen: Were you the person who compiled the data embraced in the reports of the mine inspectors of the State?

Mr. Miller: Yes, sir.

Mr. Gowen: And the reports which you made to the inspectors, so far as you know, were true; were they not?

Mr. Miller: To the best of my knowledge.

Mr. Glasgow: I think you should direct his attention to them if you can.

Mr. Gowen: I haven't them here.

Examiner Brown: Are you going to use them?

Mr. Gowen: I have not looked at Falcon No. 2.

Mr. Glasgow: If I were the witness I would be at great hesitation in answering unless I knew what you were directing my attention to.

Mr. Gowen: They may be perfectly accurate; I do not know.

Mr. Glasgow: If those reports are used in any way, I will reserve the right to have Mr. Miller come back and make any explanation that may be necessary. We have been working on these sheets, Mr. Examiner, and we have gotten over probably nine months of it, I think. I want to ask that we be permitted to go on and make up such tabulations as we can from these sheets, and then if we find that it is not necessary to have any further hearings to investigate or to explain some of the notations we have on the sheets, to help out the statements, we will submit the statements we make up to Mr. Gowen; and if he wants to put in some evidence—no doubt he will—we can have another hearing at some other time.

Examiner Brown: I hope, if possible, that you will avoid that. That is the tabulation that you put

ɔeing a transcript of the distribution sheets of the road company. I trust that you and Mr. Gowen be able to agree that that is a transcript of the ribution sheets and then I do not see why it would ecessary to take any more testimony. Do you, Gowen?

Mr. Gowen: I should not think it likely we would to.

Mr. Glasgow: It may be that with our tabulations statements, we may have to put a witness on to e some explanations. I am just reserving that t.

Examiner Brown: That you could do at Wash-on?

Mr. Glasgow: Yes.

Examiner Brown: That may be done there on ap-ation to the Commission.

Mr. Glasgow: I am merely reserving the right for own protection to do so if it is necessary.

Examiner Brown: I would say this to counsel for sides, that there are four cases involving this ation upon the Tyrone division, and very naturally four cases will be considered together in a ger-sense, as far as the evidence in one is applicable e evidence in the other situation, they will all be idered probably together. And I do not see why should not be argued together.

Mr. Glasgow: There is one thing Mr. Gowen has ested, that he might be able to give us a state-showing the distribution of cars to the several ions. We were discussing that yesterday.

Mr. Gowen: Yes, I am sure we can do that.

Mr. Glasgow: Of course, we cannot tell until we hat as to whether we would want to put in any er testimony or not. After we get that, we can er it, and it is perfectly agreeable to me that this be heard with the other cases of like character.

Mr. Gowen: What is the understanding, are these sheets in evidence?

Mr. Glasgow: We are going to put in statements from them.

Mr. Gowen: I think it is better to put the sheets in, because we want to refer to some matters in them.

Examiner Brown: I think this may be done. Of course, we do not want to encumber the record with those 300 or 400 sheets.

Mr. Gowen: But consider them in evidence.

Examiner Brown: Yes, we will consider them in evidence and that either party may refer to them, or make any deductions or arguments from which would be applicable to this situation.

Mr. Glasgow: I did not suppose we could possibly put these sheets in evidence and send them down to Washington, as they are constantly in use. If there is any part of it Mr. Gowen wants to refer to at the argument, I think he ought to indicate to us by letter or something of that kind what he wants to refer to.

Examiner Brown: Yes. As I understand it, you are going to make a table or tables taken from these sheets. You will submit them to Mr. Gowen, and he will look them over, and if he has any objections he will offer them to your tables. He will also have the right to make a table taken from those sheets of his own. That he will submit to you and you can make your objection to it, and it will go before the Commission in that way, and you can make your arguments from it.

Mr. Glasgow: If you can let me have the information as to the distribution to the several divisions, we can take that up.

Examiner Brown: That closes your case?

Mr. Glasgow: That is all we can do now.

Examiner Brown: Do you desire to put in any testimony?

Mr. Gowen: I do not think so, unless these tables develop something.

Examiner Brown: Of course, if the tables develop anything which requires further testimony, you will have to make application to the Commission in respect thereto.

Mr. Glasgow: I was going to suggest that there are certain statements that Mr. Knipe has to furnish also as to tonnage.

Mr. Gowen: I thought the understanding was you were to send someone up there yesterday.

Mr. Glasgow: I have not done that.

Examiner Brown: The record shows that you were going to send someone to Mr. Knipe's office.

Mr. Glasgow: There is one question I wanted to ask Mr. Jacoby."

Mr. Glasgow: I will now read the testimony of Mr. Jacoby when he was recalled.

(Mr. Glasgow read the testimony of W. F. Jacoby when he was recalled, as follows):

"W. F. JACOBY, recalled for further examination, having been previously sworn, testified as follows:

Mr. Glasgow: You heard the question propounded by Mr. Gowen yesterday as to the difference in royalty between May, 1904, and February, 1905, my recollection being that the royalty as counted in the cost of production in February was some six or seven cents greater than it was in May, 1905. Can you explain as to why there should be that difference in royalty?

Mr. Jacoby: It was explained by Mr. Rettew as some back royalty having been charged to that particular month for house coal or boiler coal or whatever it was. While it affects that particular month, it does not affect the yearly average of the cost.

Mr. Glasgow: The yearly average of royalty remains the same, does it?

Mr. Jacoby: Yes, sir; it should have been distributed, perhaps, during the whole period.

Mr. Glasgow: Over the whole period?

Mr. Jacoby: Over the whole period.

Mr. Glasgow: The reason the royalty ran up high in that month, was that in some preceding months it ran below the average?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: So the average was the same covering the whole year?

Mr. Jacoby: Yes.

Examiner Brown: What was the royalty?

Mr. Jacoby: Fifteen cents a ton.

Examiner Brown: That was affected by boiler coal?

Mr. Jacoby: Yes, sir; I believe so. So Mr. Rettew testified.

Examiner Brown: And coal used by the miners?

Mr. Jacoby: Yes.

Examiner Brown: But wherever you shipped the coal it was 15 cents?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And the reason it ran up in February or May, 1905, was that during that same year part of your royalty on coal which you had taken out had not been paid?

Mr. Jacoby: Yes, sir; a small tonnage in that particular month.

Mr. Glasgow: And really that excess cost should have been distributed as a bookkeeping item over the whole period?

Mr. Jacoby: Yes, sir.

Examiner Brown: Let the record show that certain tables compiled from distribution sheets are to be furnished by the complainant and by the defendant

if desired. Also that certain statements showing the actual tonnage from the Tyrone division during this period from April 1st, 1904, to October 15th, 1905, and that there are certain tables to be submitted showing the distribution of cars to the Tyrone division and to the other several divisions on the Pennsylvania Railroad covering this period; and that there are certain statements and tables to be gotten up by Mr. Jacoby as a part of his evidence showing such contracts as he may have had for coal or cars which he took and which he could not fill, or orders which were offered to him and which he was unable to take on account of not having cars.

The complainant and the defendant reserve the right if found necessary, to take any additional statements of witnesses in explanation of the above tables upon application to the Commission therefor. The case will be closed, and upon the receipt of these tables, the complainant will have fifteen days, in the absence, of course, of application to the Commission for the taking of additional testimony, in which to file its brief; the defendant will have ten days thereafter to file its reply brief, and the complainant will have five days in which to file a reply to that.

If the case is to be argued before the Commission, application will be made to the Commission therefor."

Examiner Brown: Gentlemen, the Interstate Commerce Commission has set case No. 1139, W. F. Jacoby & Company against the Pennsylvania Railroad, for the taking of further testimony at this time and place. The appearances will be the same as before. (Mr. John H. Minds also appeared, later, for the complainant.) It appears that at the conclusion of the taking of testimony in this case on May 15th, 1908, in this place, that

certain tables, compiled from the distribution sheets, were to be furnished by the complainant, and by the defendant, if desired; also certain statements showing the tonnage from the Tyrone division during this period from April 1st, 1904, to October 15th, 1905, and certain tables showing the distribution of cars to the Tyrone division and several other divisions on the Pennsylvania Railroad, covering this period, and that there were certain statements or tables to be gotten up by Mr. Jacoby, as part of his evidence, showing such contracts as he may have had for coal or cars which he took and could not fill, or orders which were offered to him and which he was unable to take on account of not having cars. And at that time the complainant and defendant reserved the right to take additional statements of witnesses in explanation of the above tables. So that is the purpose of this hearing today.

Mr. Glasgow: I just want to get the exhibits in shape. Exhibit No. 1, which was filed at the last hearing, is an inventory of the plant at Falcon No. 2, of W. F. Jacoby & Company, which has already been filed, and which I want to turn over.

Examiner Brown: Now, Mr. Glasgow, there were a number of other exhibits.

Mr. Glasgow: Yes, sir; I have them here.

Examiner Brown: You have them there.

Mr. Glasgow: I want to put them in order so that you will understand them. Exhibit No. 2, which was filed at the previous hearing, is a statement of cars loaded at Falcon No. 2 mine from April 1st, 1904, to April 1st, 1905.

Examiner Brown: You had copies of that before, Mr. Gowen?

Mr. Gowen: Yes, sir.

Mr. Glasgow: The second sheet of which (referring to Exhibit No. 2) is a statement of cars loaded

at Falcon No. 2 from April 1st, 1905, to October 15th, 1905.

Examiner Brown: If there are no changes in those exhibits, Mr. Glasgow—did you not have them identified before?

Mr. Glasgow: Yes, but I just want to get in a consolidated form how the exhibits stand. Exhibit No. 3, Mr. Examiner, which was introduced at the previous hearing, is a statement of the cost of coal—the average cost of coal, Falcon No. 2, from April 1st, 1904, to April 1st, 1905. Exhibit No. 4, heretofore marked by the Examiner, is the cost of coal from April 1st, 1905, to October 15th, 1905, at Falcon No. 2. Exhibit No. 5, heretofore marked by the Examiner, is a tonnage statement from Falcon No. 2 mine from April 1st, 1904, to March 31st, 1905. This also contains a second sheet showing a tonnage statement for the same mine from April 1st, 1905, to October 15th, 1905. Exhibit No. 6, heretofore marked by the Examiner, is the estimated cost of coal from April 1st, 1904, to April 1st, 1905. Exhibit No. 7, as heretofore marked by the Examiner, is the average market price realized for Falcon No. 2 coal from April 1st, 1904, to April 1st, 1905, and also the same for the period from April 1st, 1905, to October 15th, 1905. Exhibit No. 8, heretofore marked by the Examiner, is a statement of claim from April 1st, 1904, to April 1st, 1905, Falcon No. 2 mine; and the same statement from April 1st, 1905, to October 15th, 1905.

Examiner Brown: That is, when you speak of the claim, you mean claim for reparation.

Mr. Glasgow: Yes, sir.

Examiner Brown: There seems to have been one more (referring to transcript of previous hearing), on page 99, at the top of the page.

Mr. Glasgow: Yes, sir—page 99. Exhibit No. 9, as marked by the Examiner, is the statement referred

to in the evidence of Mr. Fred B. Lott, at page 99 of the testimony.

Examiner Brown: This refers to the cost of coal during a certain period.

Mr. Glasgow (showing Mr. Gowen a paper): This is a statement we have gotten up from the distribution sheets, and about which I am going to cross-examine Mr. Jacoby and Mr. Webb. I would like to call Mr. Jacoby, Mr. Examiner.

Examiner Brown: Take the stand, Mr. Jacoby. You have been heretofore sworn in this case?

Mr. Jacoby: Yes, sir.

W. F. Jacoby, called as a witness, and having previously been sworn, testified as follows:

Direct Examination.

Mr. Glasgow: Mr. Jacoby, you have been previously sworn in this case?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: I hand you, for identification, statement marked "Detail statement showing discrimination in favor of other mines and against Falcon No. 2, from April 1st, 1904, to April 1st, 1905, the second sheet of which statement covers the period from April 1st, 1905, to October 15th, 1905; which I will ask the Examiner to mark as Exhibit No. 10. Did you have anything to do with the preparation of that statement?

Mr. Jacoby: Yes, sir.

(The paper was received in evidence, and marked as Complainant's Exhibit No. 10, attached to Mr. Jacoby's testimony.)

Mr. Glasgow: I also hand you, as accompanying that, a statement in two sheets, headed "Comparative

Statement, April 1st, 1904, to April 1st, 1905, taken from Pennsylvania Railroad Distribution Sheets." And the second sheet of which contains the same information as from April 1st, 1905, to October 15th, 1905; which I will ask the Examiner to mark as Exhibit No. 11. Did you have anything to do with the preparation of that?

Mr. Jacoby: Yes, sir. Mr. Weber and I made those up.

(The paper was received in evidence, and marked as Complainant's Exhibit No. 11, attached to Mr. Jacoby's testimony.)

Mr. Glasgow: Referring to the Exhibit No. 10, which you have before you, I see that you have taken in the first column a number of mines. How many mines did you use on the Tyrone division, as shown there, in making up your comparative statement?

Mr. Jacoby: About twenty of the largest mines on the division.

Mr. Glasgow: I see there are only twelve in that list.

Examiner Brown (examining exhibit): Fifteen, anyhow.

Mr. Jacoby: Berwind-White's are all under one heading, and represent seven mines there?

Examiner Brown (reading): "Peerless No. 1, 2, 3."

Mr. Glasgow: About twenty mines?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Can you give us approximately the tonnage shipped by those twenty mines of the whole tonnage from the Tyrone division?

Mr. Jacoby: These mines ship in bulk, or majority of the tonnage coming from the Tyrone division; approximately, I think, between sixty and seventy per cent. of the total tonnage that came from off the division.

Mr. Glasgow: In that statement, under the first heading, "Rated Capacity based on 167 distribution days, 32 tons per car"——

Examiner Brown: Hold on! Three hundred and eight distribution days.

Mr. Glasgow: I have got some sheets mixed; "Rated capacity based on 308 distribution days, 32 tons per car." Why did you take 308 days?

Mr. Jacoby: We counted the distribution sheets and found that the Pennsylvania Railroad Company had made a distribution for 308 days during the year.

Mr. Glasgow: During the period covered by that?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And on the second sheet you took 167 days; why did you do that?

Examiner Brown: From the distribution sheets covering that period, of the Pennsylvania Railroad?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Why did you take 32 tons to the car?

Mr. Jacoby: We found by figuring, that that was the nearest average we could get of the cars that were on the division at that time; about 32 tons to the car. I might add there that the cars we have had at Falcon No. 2 mine averaged about 32 tons to the car during the year.

Mr. Glasgow: Now, then, under the head of "Rated Capacity" in cars of Falcon No. 2, you put 4331, and tons 138,600, and for the several mines under, following along in the ten columns, you have the rated capacity stated in cars and tons. How did you get at that?

Mr. Jacoby: We took the rated capacity of the mines as shown by this sheet.

Examiner Brown: Shown by the distribution?

Mr. Jacoby: As shown by the distribution sheet, which showed that Falcon No. 2 mine, for instance,

would have been entitled to 138,600 tons, because it was rated at 400 tons per day.

Examiner Brown: Providing it shipped each day 308 days.

Mr. Jacoby: In other words, it was the rated capacity for the year.

Mr. Glasgow: You got that, Mr. Jacoby, by taking the number of rated tons per day, as shown on the distribution sheet of the Pennsylvania Railroad, and multiplied that by the number of tons that the distribution sheets showed as the distribution?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And that made 4331 cars for the Falcon No. 2, and 138,600 tons; and for the other mines, in order, worked out the same result?

Mr. Jacoby: Exactly.

Mr. Glasgow: Then, in the second column, headed "Shipped, based on 32 tons per car,"—what does that show?

Mr. Jacoby: That shows what Falcon No. 2 mine actually received during that period, also what the other mines on the statement received; which figures were taken from the distribution sheets of the Pennsylvania Railroad Company.

Mr. Glasgow: Then, the per cent. column shows what?

Mr. Jacoby: The per cent. column shows that Falcon No. 2 mine got twenty-eight per cent. of its rated capacity during the year, while for the other mines on this statement it shows that some of them got as high as eighty-eight per cent. and more.

Mr. Glasgow: And it ranged——

Mr. Jacoby: It ranged from forty-three.

Mr. Glasgow: Forty-three to eighty-eight per cent.?

Mr. Jacoby: Yes, sir; eighty-eight and nine-tenths per cent.

Mr. Glasgow: Then, the next column, headed "twenty-eight per cent. would be," etc.—does that show the number of cars each of the mines handled—what Falcon No. 2 mine would have gotten if it had had twenty-eight per cent. of the rated capacity?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And the next column shows "Difference in excess of Falcon No. 2," which each of those mines got by reason of its getting a greater percentage than Falcon got?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Shows the number of tons that each got over the percentage that Falcon got?

Mr. Jacoby: Yes, sir; the column shows it in cars, tons and per cent.

Mr. Glasgow: The same information is shown as between April 1st, 1905, and October 15th, 1905?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Now, Exhibit No. 11, which you have before you; from what information did you make up Exhibit No. 11?

Mr. Jacoby: From the distribution sheets of the Pennsylvania Railroad Company.

Mr. Glasgow: That seems to show the same information as in No. 10, except in monthly statements.

Examiner Brown: In detail?

Mr. Jacoby: More in detail; yes, sir.

Mr. Glasgow: Shown monthly. For illustration, that statement shows that from April 1st, 1904, to March 31st, 1905, Falcon No. 2 had what rated capacity?

Mr. Jacoby: Four hundred and fifty tons per day.

Mr. Glasgow: And during that period how many cars did it get?

Mr. Jacoby: One thousand two hundred and thirty-seven.

Mr. Glasgow: It shows that for Leland No. 1, during that period,—the rated capacity was what?

Mr. Jacoby: Leland No. 1—the rated capacity from April 1st, 1904, to October, 1904, was 200 tons.

Mr. Glasgow: Per day?

Mr. Jacoby: Per day. From October to March 31st, 1905, it was 400 tons per day.

Mr. Glasgow: What was the total number of cars received by Leland during that period?

Mr. Jacoby: Two thousand one hundred and twenty-two.

Mr. Glasgow: That information which you have given is detail as to Falcon No. 2 and Leland, is given during the whole period covered by the statement for the other mines that are mentioned therein?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Monthly?

Mr. Jacoby: Monthly.

Mr. Weber: Let me suggest that the Statement No. 10 is the average number taken from No. 11. Probably it would be more plain if you turned it the other way.

Examiner Brown: That was in detail, and this is tons.

Mr. Glasgow: Then, as I understand you, No. 11 is the detail statement from the distribution sheets of the Pennsylvania Railroad, and No. 10 is a ton statement made up from Exhibit No. 11?

Mr. Jacoby: That is it; yes, sir.

Examiner Brown: Now, perhaps, to get it in order, we will let Mr. Brown now cross-examine on these, rather than cross-examine on all.

Mr. Glasgow: There are several other statements, I think—two or three.

Examiner Brown: I thought that would make it handier to examine the record; probably handier for Mr. Gowen, also.

CROSS-EXAMINATION.

Mr. Gowen: Referring, Mr. Jacoby, to the statement as to which you have last testified, that is, the detailed statement covering the period April 1st, 1904, to April 1st, 1905, which you say was compiled from the railroad company's distribution sheets, will you please—to get this on the notes—will you please refer to that statement and tell us whether, in respect to any of the mines with which comparison has been made, with the one exception of the Berwind-White Coal Mining Company's mines, you have shown separately individual cars, the company fuel cars, and the commercial cars received?

Mr. Jacoby: Yes, sir.

Mr. Gowen: The Berwind-White is the only one in which that appears; is it not?

Mr. Jacoby: That and the Lehigh Valley Coal Company are the two that were separated—the various kinds of cars.

Mr. Gowen: Taking the Berwind-White Coal Company mines, what number of commercial cars did all those mines together receive in the period covered?

Mr. Jacoby: They received 460 cars.

Mr. Glasgow: Which period?

Mr. Gowen: April 1st, 1904, to April 1st, 1905. That is, during the period referred to, April 1st, 1904, to April 1st, 1905.

Mr. Jacoby: Four hundred and sixty cars.

Mr. Gowen: At how many mines were those cars delivered?

Mr. Jacoby: The distribution sheets showed seven mines; some of those, however, appear to have been carried on the distribution sheets while they were not working.

Mr. Gowen: I am referring to the table which you have prepared from the distribution sheets; I merely want to get it on the notes.

Mr. Jacoby: There were seven mines that represent that.

Mr. Gowen: During that same period, how many cars were received by the Falcon at its one mine?

Mr. Jacoby: During that same period 1237 cars.

Mr. Gowen: And they were practically all commercial cars?

Mr. Jacoby: All kinds of cars.

Mr. Gowen: Were they all practically commercial cars?

Mr. Jacoby: Yes, I believe they were all commercial cars.

Mr. Gowen: Were any of them company fuel cars?

Mr. Jacoby: No, sir.

Mr. Gowen: Any individual cars?

Mr. Jacoby: A few.

Mr. Gowen: How many?

Mr. Jacoby: I think I borrowed twenty or twenty-five from one of the other shippers.

Mr. Gowen: Taking the second period, from April 15th, 1905, to October 15th, 1905, do you show the number of individual, company fuel, and commercial cars delivered to any of the mines except to the Berwind-White Coal Mining Company mines?

Mr. Jacoby: No.

Mr. Gowen: During that period, how many commercial cars were delivered to the Berwind-White Coal Mining Company, or its mines?

Mr. Jacoby: Sixty.

Mr. Gowen: How many to the Falcon?

Mr. Jacoby: Five hundred and forty-one.

Mr. Gowen: All commercial cars, were they not—practically?

Mr. Jacoby: Yes, sir.

Mr. Gowen: Now, Mr. Jacoby, referring to Statement No. 10, and to the second sheet of that statement, during the period covered by that statement;

that is, from April 1st, 1904, to April 1st, 1905, upon what basis of capacity were the cars distributed by the Pennsylvania Railroad Company? What was a wooden car assumed to hold? I don't say what it actually held—what it was assumed to hold.

Mr. Jacoby: I really do not know; I could not say; they had so many different ways of doing it that I could not keep track of it.

Mr. Gowen: Was it not the fact that during that period the wooden car's capacity was treated as twenty-five tons, and the steel car as double that capacity, as the basis of distribution?

Mr. Jacoby: I could not say that I understood that to be the general rule; it may have been in some cases where the company desired to favor some shippers, and not in other cases.

Mr. Gowen: You do not believe that was the basis?

Mr. Jacoby: I do not believe it was.

Examiner Brown: A little more in detail just give us how you arrived at that thirty-two tons.

Mr. Jacoby: Simply treated a car as a car.

Examiner Brown: The actual weight of the coal in the car?

Mr. Jacoby: Yes, the actual weight of the coal in the car. Then we divided the number of tons that those cars carried into the number of cars that we received, and struck the average of thirty-two tons.

Mr. Glasgow: Was not that thirty-two tons arrived at by taking the total tonnage you shipped and the total number of cars you shipped, and dividing the total tonnage by the total number of cars; and did you take that as the average?

Mr. Jacoby: Yes, sir.

Mr. Gowen: So that the thirty-two tons was made up entirely from your own shipments?

Mr. Jacoby: Not entirely so; I believe we proved

at out by using some other methods.

Mr. Gowen: What other methods? I want to get is accurately.

Examiner Brown: Go into detail as to how you rrived at the thirty-two tons being the average.

Mr. Jacoby: My recollection is that we used the me method on some other of the mines.

Mr. Weber: I think I can answer that question.

Mr. Jacoby: Mr. Weber is a little more familiar ith the details of the figuring.

Examiner Brown: I think I desire to ask one estion; I think it is in the record now, but I want be sure. Were you prepared, from April 1st, 1904, April 1st, 1905, to ship coal every day for 308 days ring that year?

Mr. Jacoby: Yes, sir.

Examiner Brown: And from April 1st, 1905, to tober 15th, 1905, were you prepared to ship coal 7 days of that period?

Mr. Jacoby: Yes, sir.

Mr. Gowen: How do you reconcile the answers ich you have just given, Mr. Jacoby, with the State- ent No. 5, which you have put in evidence, and which ows that during the period from April 1st, 1904, to arch 31st, 1905, the actual number of days that your ne was capable of producing its capacity was 275 ys, and during the second period was 138¼ days?

Mr. Jacoby: That was made up simply on an timate—simply estimated. We had no way of get- g at anything actual at that time.

Mr. Glasgow: Mr. Examiner, if you will refer to e fourth——

Examiner Brown: Yes, I see the mine was dis- led twenty-two days; actual days mine was capable producing its full capacity, two hundred and enty-five.

Mr. Glasgow: When you made up that statement

you made an estimate of how many days your mine was receiving car distribution?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And you estimated that as what?

Mr. Jacoby: Two hundred and seventy-five days.

Mr. Glasgow: And when you came to make up the statement which Mr. Gowen has referred to as No. 11, that showed the actual distribution days, which information you got from sheets of the Pennsylvania Railroad?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Whereas, in No. 5, you were estimating at that time, not knowing the number of distribution days?

Mr. Jacoby: That is right.

Mr. Gowen: Now, Mr. Jacoby, what you have just stated to Mr. Glasgow requires me to ask you one or two more questions. Take that Statement No. 4, please — have you got it? The first column of the statement shows, does it not, the number of days comprised in the period covered by the statement to be 365?

Mr. Jacoby: Yes, sir.

Mr. Gowen: The second column shows the number of Sundays for that period?

Mr. Jacoby: Yes, sir.

Mr. Gowen: Fifty-two?

Mr. Jacoby: Yes, sir.

Mr. Gowen: The third shows the legal and miners' holidays as sixteen?

Mr. Jacoby: Yes, sir.

Mr. Gowen: The fourth shows the number of days mine was disabled, and the delays caused by accidents, and the number given is twenty-two?

Mr. Jacoby: Yes, sir.

Mr. Gowen: Now, then, have you not deducted those three last numbers—52, 16 and 22—from the three hundred and sixty-five days, in order to deter-

nine the number of days that your mine was capable of working during that period?

Mr. Jacoby: Well, it would indicate——

Examiner Brown: That is what it figures out.

Mr. Jacoby: [illegible] is what it figures out.

Mr. Gowen: [illegible] that, in point of fact, during that period your mine was only capable of working two hundred and seventy-five full days?

Mr. Jacoby: That is what the statement shows.

Mr. Gowen: And during the other period—the later period from April 15th, 1905, to October 15th, 1905, was actually capable of working only one hundred and thirty-eight and one-quarter days?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Where did you get the number of legal and miners' holidays, of sixteen, during the period from April 1st, 1904, to March 31st, 1905?

Mr. Jacoby: I think we got those from some reports that were sent down from the mine during that period by our superintendent. I might say, in that connection, that we had a number of different nationalities working in the mine, and sometimes it happened that they did not appear on certain holidays, so that while there are sixteen holidays, they may have been in position to work, nevertheless.

Mr. Glasgow: Then, does that mean—"legal and miners' holidays"—that your mine was absolutely out of commission during those days?

Mr. Jacoby: No, it does not. It does not mean that it was out of commission, but there may have been a third, or a half, or a quarter of the men, that observed that particular holiday—that they were out and reduced the force to that extent.

Mr. Glasgow: Then, the column headed "Mine disabled and delays caused by accidents, etc."—where did you get that information?

Mr. Jacoby: We got that from the superintendent's report.

Mr. Glasgow: You mean that that was the number of days, twenty-two days, that your mine was unable to work?

Mr. Jacoby: I guess that it right, as I remember it.

Mr. Glasgow: So that, according to your statement, whereas the distribution days of the Pennsylvania Railroad were three hundred and eight, you were absolutely ready to work two hundred and seventy-five days?

Mr. Jacoby: Yes, without a question of doubt, and I think more; but this was made up on a very conservative basis.

Examiner Brown: So that would modify your tables Nos. 10 and 11 to the extent of about nine per cent. Two hundred and seventy-five are thirty days less, which would be about nine per cent. of three hundred and eight.

Mr. Gowen: Mr. Jacoby, you could have shown in these statements which you have prepared, Nos. 10 and 11, the number, or the division of the cars as between individual, fuel and commercial, which were distributed to these other mines, as readily as you have the Berwind-White distributions?

Mr. Jacoby: It would have made a great deal of work—an almost endless job, and in some cases the distribution sheets were rather intricate on that particular point, and we decided not to do it.

Mr. Gowen: Do not the distribution sheets show, or did not they show for the period covered by these statements, the aggregate of cars delivered at all the operations which you have embraced in that statement, as between individual, fuel, company fuel, and commercial.

Mr. Jacoby: Yes, there is a column for each of those cars. They do show it, subject, however, to some

errors that we noticed on the distribution sheets, at times, apparently.

Mr. Gowen: But they showed the exact information with respect to these other mines as with respect to the Berwind-White?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: You mean there was a column, but as to whether it was shown in each specific instance, are you able to say?

Mr. Jacoby: I could not say that in every instance.

Mr. Glasgow: But there was a column applicable to the other mines as well as to the Berwind-White, for that information?

Mr. Jacoby: Yes, sir; they were simply concentrated, because instead of showing the distribution to each mine they just simply showed the cars in a lump each day; made it more easy to get it on.

Mr. Glasgow: In the statement No. 11, to which Mr. Gowen has called your attention, first page, there is a division of the Lehigh Valley Coal Company cars.

Mr. Jacoby: Yes, sir.

Mr. Glasgow: During the period from April 1st, 1904, to April 1st, 1905, that company received 4267 Lehigh Valley cars. Those you classed as individual cars?

Mr. Jacoby: Yes, sir; I suppose so.

Mr. Glasgow: They were foreign cars sent in for their coal?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And during the same period, it received 4271 Pennsylvania Railroad cars?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Were those classed as commercial cars from the Pennsylvania Railroad?

Mr. Jacoby: Yes, sir; I should say so.

Mr. Glasgow: And while the Berwind-White Com-

pany got 460 of what you call commercial cars, during that period, they received 11,218 of what you call individual cars?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Those cars carried commercial coal just as well as any others, didn't they?

Mr. Jacoby: Certainly.

Mr. Glasgow: And "of company coal" it got 1774?

Mr. Jacoby: Yes, sir; they were so placed on the distribution sheet; whether they were used for that purpose I could not say.

Mr. Glasgow: Referring to the statement No. 5—Exhibit No. 5—in which you state the days that your mine was disabled from accidents, etc., showing that you were actually in position to work two hundred and seventy-five days; in making a comparison with the other mines of that locality—three hundred and eight days appears to have been the distribution sheet—have you made up any statement showing what days those mines were disabled, other than your own?

Mr. Jacoby: No, I have not.

Mr. Glasgow: Have you any reason to believe that your mine was disabled above the average of the mines in the locality?

Mr. Jacoby: On the contrary, I do not believe near as much so, because we had excellent equipment, and so on.

Mr. Glasgow: If it was not disabled more than the other mines in the same region, would the fact of your being disabled twenty-two days affect the comparison which you have made as between your mine and others?

Mr. Jacoby: No, it would not.

Mr. Gowen: Referring to cars placed for the Lehigh Valley Coal Company, which you show in this statement, they were placed at what are known as the Snow Shoe mines, were they not?

Mr. Jacoby: Yes, sir.

Mr. Gowen: Do you know, as a matter of fact, that the entire output of the Snow Shoe Company's operation, goes to the Lehigh Valley Railroad Company for its fuel supply?

Mr. Jacoby: I do not know it to be a fact; I understand it does, and the mines are owned by the Lehigh Valley Coal Company, which are two separate and distinct propositions.

Mr. Gowen: That is all.

Examiner Brown: Is that all with reference to these exhibits? That is all. Let these exhibits be filed, and proceed with another.

Mr. Glasgow: I don't know whether there is any confusion, Mr. Jacoby; the mines which are on the Snow Shoe are operated by the Lehigh Valley Coal Company?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: It is not the Lehigh Valley Railroad Company's mine?

Mr. Jacoby: No, sir.

Mr. Glasgow: I call your attention, Mr. Jacoby, to statement headed "Amended Statement of Claim," which I will ask the Examiner to mark as Exhibit No. 12, and ask you whether you had anything to do with the preparation of that.

Mr. Jacoby: Yes, sir; I did.

(The statement was received in evidence, and marked Complainant's Exhibit No. 12, attached to Mr. Jacoby's testimony.)

Mr. Glasgow: That purports to be an amended statement of claim. Had you previously filed a statement of your claim?

Mr. Jacoby: We had filed an estimated statement of our claim; yes, sir.

Mr. Glasgow: Statement of claim——

Mr. Jacoby: Statement of claim based on this No. 5 statement.

Mr. Glasgow: Based on the estimated car service?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Why did you prepare that amended statement?

Mr. Jacoby: I was asked at the former hearing, by the Commission, to prepare that statement, based on actual facts——

Mr. Glasgow: Based upon the distribution sheets?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Then, as I understand it, the former statement, which was I. C. C. No. 8, I think—look and see.

Examiner Brown: Yes, it refers to No. 8.

Mr. Glasgow: The former statement, which was Exhibit No. 8, was based on your estimates as to car distribution, and the amended statement has been gotten up by you after getting the distribution sheets?

Mr. Jacoby: Yes, sir."

(At 1 o'clock P. M. a recess was taken until 2 o'clock P. M.)

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2 o'clock P. M.

Present: Parties as before noted.

Mr. Glasgow continued the reading of the testimony of W. F. Jacoby, as follows:

"Mr. Glasgow: I understand in that statement, Mr. Jacoby, on the first sheet, for the period from April 1st, 1904, to April 1st, 1905, the total shipments from the twenty mines which you have taken into consideration, including your Falcon, from the Tyrone division, were 1,142,656 tons.

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Did you make this up, or Mr. Weber?

Mr. Jacoby: Mr. Weber and I together. I can testify on this part of it, I guess.

Mr. Glasgow: You took as the total shipments of the twenty mines the figures I have given?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And that was what percentage of the entire shipments?

Mr. Jacoby: Fifty-nine and nine-tenths per cent. of the full rated capacity.

Mr. Glasgow: Of the full rated capacity?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: So that the average shipments of the twenty mines was 59.9 per cent. of the rated capacity?

Mr. Jacoby: Of their rated capacity; yes, sir.

Mr. Glasgow: Then you shipped from Falcon during that same period 38,714 tons?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: What per cent. was that of your rated capacity?

Mr. Jacoby: Twenty-eight per cent.

Mr. Glasgow: And you therefore figure, as I understand your statement, that you were 31.9 per cent. below the average percentage shipped by all the mines of their rated capacity?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And upon that basis you figure out what would have been the tonnage if Falcon had shipped the average percentage of 59.9?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: You figure out what you lost during that period as 44,157 tons?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And you figure that that 44,000 tons was a loss to you, at the rate of profit shown under

Exhibit No. 8, amounting to, in total, $25,288.67; is that right?

Mr. Jacoby: Exhibit No. 8?

Mr. Glasgow: Yes, that is what you say on that statement.

Mr. Jacoby: No, I say Statement No. 8.

Mr. Glasgow: Statement No. 8 figures out what you lost for the period?

Mr. Weber: Statement No. 8, I think, shows the cost.

Mr. Glasgow: Oh, that has not been put in evidence yet.

Mr. Glasgow: Then you figure out what your loss was, at $25,288.67?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: On figures, the details of which are in a statement hereafter to be filed. The next exhibit will be 13.

Examiner Brown: We have just gotten "Exhibit No. 13" below; which will be Statement No. 8, Exhibit No. 13.

Mr. Glasgow: Then you have in that amended statement, loss sustained on account of excessive cost of production due to inadequate car supply. Explain that item.

Mr. Jacoby: Well, that item is arrived at upon figures shown in a former statement I made up.

Examiner Brown: That is Exhibit No. 8, is it not?

Mr. Jacoby: No.

Mr. Glasgow: Exhibit No. 13, it will be, will it not?

Mr. Jacoby: Exhibit No. 6 is the one on which that amount is based.

Mr. Glasgow: How did you work that out—that loss, that item?

Mr. Jacoby: That is the difference between the ac-

tual cost as appearing on Statement No. 1——

Mr. Glasgow: What is that —No. 1?

Mr. Jacoby: Statement No. 1 shows the actual cost of production for the year.

Mr. Glasgow: You mean Exhibit No. 1.

Examiner Brown: No, it is Exhibit No. 3.

Mr. Glasgow: Why not refer to them as exhibits? How do you arrive at that item of $4738.27 on your amended statement?

Mr. Jacoby: That item was arrived at by taking the actual cost of production for the year April 1, 1904, to April 1, 1905, as shown by Statement No. 1, Exhibit No. 3; the normal cost—Statement No. 2, Exhibit No. 6—was arrived at by an estimated cost of the production, if we had been able to ship the mine's capacity.

Mr. Glasgow: I understand that item is arrived at in this way. You took what your normal actual cost was, as shown by the exhibits heretofore filed, based upon the tonnage which you actually shipped?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And the item there is arrived at by showing that, upon a larger tonnage, your cost would have been smaller proportionately?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And you worked out that if you had gotten the tonnage which you claim you were entitled to, that your actual cost of production would have been $4738.27 less, for the period covered by your statement, to which I have referred?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: That is based upon the theory that the greater the tonnage produced the less cost per ton to produce?

Mr. Jacoby: Certainly. It shows in this monthly statement that where the tonnage was small the cost

went way up, and where it was larger it came way down.

Mr. Glasgow: Have you got any detailed statement as to how that $4738.27 was worked out? Does that appear anywhere?

Mr. Jacoby: No, nothing more than these two statements—Exhibits 3 and 6. Still, the exhibits themselves show it in detail.

Examiner Brown: It is worked out in these statements.

Mr. Glasgow: It is worked out in the statements to which reference is made?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: The other item on the amended statement, for the period of April , 1904, to April 1, 1905—"Additional loss sustained on account of discrimination against Tyrone division and Falcon No. 2 mine, due to arbitrary assignment and sale of cars to other shippers, as shown by testimony and detail statement No. 9 herewith"—that ought to be Exhibit No. 13, should it not?

Mr. Jacoby: It would be in 13, I think.

Mr. Glasgow: The details of that item will be shown, then, in Exhibit No. 13, to be hereafter introduced?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: How did you get the information as to discrimination against the Tyrone division?

Mr. Jacoby: It was testimony given before the Interstate Commerce Commission, I believe, conducted here in Philadelphia.

Mr. Glasgow: Did the distribution sheet show anything on the subject?

Mr. Jacoby: No, they did not.

Mr. Glasgow: What amount of cars do you claim were assigned improperly to other divisions, as against Tyrone?

Mr. Jacoby: I cannot give you the figures unless I have the statement.

Mr. Glasgow: Well, get the figures.

Mr. Jacoby: You have it before you. (Then, after examining statement) 640 cars per day, we figured up from the testimony, were the cars sold to other shippers and arbitrarily assigned to the Berwind-White Coal Mining Company, to which the Tyrone division would have been entitled, according to Mr. Trump's statement, of 10.9 per cent.

Examiner Brown: Of all the cars?

Mr. Jacoby: Of those 640 cars.

Examiner Brown: No.

Mr. Glasgow: You mean you figured out there were 640 cars arbitrarily assigned, so far as you know, to other divisions, which were not divided on the percentage as between the divisions?

Mr. Jacoby: Yes.

Mr. Glasgow: What constituted these 640 cars? What were they?

Mr. Jacoby: Five hundred cars arbitrarily assigned to the Berwind-White Coal Mining Company, and some cars sold by the Pennsylvania Railroad Company to them and the Keystone Coal & Coke Company.

Mr. Glasgow: What were the other 140?

Mr. Jacoby: They were the ones that were sold.

Mr. Glasgow: To whom?

Mr. Jacoby: As I understand it, to the Berwind-White, the Keystone——

Mr. Glasgow: Do you know?

Mr. Jacoby: I know nothing except what the testimony shows in the case.

Mr. Glasgow: I want to get the details of that definite information. Who were those 140 cars sold to, if you know?

Mr. Jacoby: The only way I could give you that

accurately would be from the testimony.

Mr. Glasgow: I have got to get at from what you base——

Mr. Jacoby: I base it on an abstract of testimony taken from that hearing.

Mr. Glasgow: Where is that abstract?

Mr. Jacoby: It is among the papers there, somewhere.

Mr. Glasgow: Can you get it and show me what were the 140 cars, and to whom they were sold?

(Some minutes occupied here in examination of certain testimony in possession of the plaintiff.)

Mr. Glasgow: You tell us, Mr. Jacoby, that your estimate of 500 of these 640 cars per day, covers cars which were assigned to the Berwind-White Company as arbitrary cars?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Where did you get the remaining 140 cars; how did you arrive at that number?

Mr. Jacoby: I got that 140 from testimony given by Mr. Hutchison before the Interstate Commerce Commission in which he says that "These 2200 cars, I suppose that would equal 140 cars a day in the movement, roughly." I used that as a basis.

Mr. Glasgow: Who is Mr. Hutchison?

Mr. Jacoby: He was then general manager of the Pennsylvania Railroad Company, at the time this testimony was taken.

Examiner Brown: I suggest that we read into the record that part of his testimony.

Mr. Glasgow: What investigation was that?

Mr. Jacoby: That was an investigation conducted by the Interstate Commerce Commission——

Examiner Brown: Familiarly known as the "Coal and Oil Investigation."

Mr. Jacoby: Conducted by Mr. Glasgow.

Mr. Glasgow: Mr. Hutchinson testified to what? Read it in.

Examiner Brown: So much of it as illustrates your point; have it read into the record.

(Witness again examines certain testimony.)

Examiner Brown: As I understand it, the testimony in the former hearings of these cases, in so far as considered applicable, was made part of this case.

Mr. Glasgow: So I understand, yes.

Mr. Jacoby (reading from abstract of testimony): Mr. Glasgow's question was, "That, with the 500 to the Keystone plus the 700 to Ellsworth, would have helped very materially, would it not?" "Mr. Hutchinson: Now, you have given the figures; I don't know anything about the figures. These 2200 cars, I suppose that would equal about 140 cars a day in the movement, roughly."

Mr. Glasgow: So that is where you got 140 cars?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Were the 500 cars assigned to Berwind-White used on the Tyrone division?

Mr. Jacoby: No, I believe not. They were sent to some other division.

Mr. Glasgow: Of the 140 you refer to the movement—was that on the Tyrone division?

Mr. Jacoby: No, that was the main line.

Mr. Glasgow: So that is where you got the 640?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And you claim that the Tyrone division was entitled to 10.9 per cent. of that?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: And that you would have been entitled at Falcon No. 2 to your percentage of the 640 cars per day?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Is that shown, Mr. Jacoby, by Ex-

hibit No. 13—which I would ask the Examiner to mark.

Mr. Jacoby: Yes, sir.

(The papers were received in evidence, and marked as "Complainant's Exhibit No. 13, Attached to Mr. Jacoby's Testimony.")

Mr. Glasgow: And it shows what you claim for the period from April 1, 1904, to April 1, 1905, as well as April 1, 1905, to October 15, 1905, does it?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Let me see that exhibit, please. Attached to Exhibit No. 13 is correspondence between you and the superintendent of the Tyrone division, and other correspondence on the subject of car distribution. I will ask that that be filed as a part of Exhibit No. 13. The original is filed with Exhibit No. 13.

Examiner Brown: In a general way, what was that—requests for cars?

Mr. Jacoby: Yes, sir; and explanations of why we didn't get cars; that kind of business.

Examiner Brown: Haven't we filed all of the exhibits now?

Mr. Glasgow: I do not understand, Mr. Gowen, that there was a statement wanted from our books, of the amount of coal that we had sold, and that we would get up and file any statement.

Examiner Brown: This is what is required (reading): that there are certain statements and tables to be gotten up by Mr. Jacoby, as part of his evidence, showing such contracts as he may have had for coal, or cars, which he took and could not fill, or orders which were offered to him, and which he was unable to take on account of not having cars.

Mr. Gowen: Yes, that is it.

Mr. Glasgow: In response to this tabulation which you were to get up, according to the record—"certain

tements to be gotten up by Mr. Jacoby, showing
h contracts as he may have had for coal or cars
ich he took and which he could not fill, or orders
ich were offered to him, and which he was unable to
e on account of not having cars''—were you able
make up a statement, a tabulated statement of writ-
contracts or written orders, in response to that
uirement which I have just read?

Mr. Jacoby: No, not a tabulated statement; I was
to make up a statement.

Mr. Glasgow: Attached to Exhibit No. 13 you have
ne statement of that character, have you?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Mr. Jacoby, beginning with April
1904, month by month, was the market demand
your coal such that you could have sold, at the
es you have shown here as the market prices, the
put of your colliery, if you had been able to mine
ship its rated capacity?

Mr. Jacoby: Yes, sir, absolutely.

Mr. Glasgow: Were there orders which you had to
down because you were unable to fill them?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Does the Exhibit No. 13 specify any
hose orders?

Mr. Jacoby: Yes, sir; the demand during the month
April, 1904, was active all through the month, in-
ing orders transferred to us with the mine when
took it over on April 1st, 1904; we were unable
ccept book orders offered at $1.35——

Mr. Glasgow: You had orders offered to you at
time for that amount?

Mr. Jacoby: Yes, sir, and over; due to short sup-
of cars. There is a letter to Mr. Johnston in evi-
e complaining during the month of April that
were not getting enough cars to fill our orders.

Mr. Glasgow: Did that continue all during the period covered by your claim?

Mr. Jacoby: The same thing continued all the way through; yes, sir.

Mr. Glasgow: And the letters which you have filed show the notification to the officers of the Pennsylvania Railroad of these facts?

Mr. Jacoby: Yes, sir; back up these statements all the way through; back up all of these statements.

Mr. Glasgow: That is all.

Mr. Gowen: Now, will you please refer to Exhibit No.—I have not got the number—the amended statement of claim?

Examiner Brown: Exhibit No. 12.

Mr. Gowen: This item of the loss that you give in that is that which you claim to have sustained because of your inability to ship 44,137 tons, is it not?

Mr. Gowen: And that loss amounted to what?

Mr. Jacoby: Twenty-five thousand two hundred and eighty-eight dollars and sixty-seven cents.

Mr. Gowen: How much is that a ton—about fifty-seven cents, is it not?

Mr. Jacoby: Approximately.

Mr. Weber: Look at the statement referred to there; that ought to be able to give it to you figured out.

Mr. Glasgow: You have got that all figured out there somewhere. It is all figured out on Exhibit No. 13.

Mr. Jacoby: Fifty-six cents and a fraction.

Mr. Gowen: Put it this way. Then, do I understand that these statements show that if you had shipped 44,157 tons additional, which would have represented 59.9 per cent. of the capacity of Falcon No. 2, you would have realized on that coal which you did not ship, a profit of between 56 and 57 cents a ton?

Mr. Jacoby: Yes, sir.

Mr. Gowen: Whereas, based on the shipment of the full capacity of the mine, the profit would have only been thirty-two cents a ton?

Examiner Brown: Cross-examine, Mr. Gowen.

CROSS-EXAMINATION.

Mr. Gowen: Mr. Jacoby, will you please refer to Exhibit No. 6? What does that exhibit show?

Mr. Jacoby: That shows estimated cost of coal from April 1st, 1904, to April 1st, 1905, based on 123,000 tons, or the rated capacity of the mine.

Mr. Gowen: What does that statement show as cost per ton?

Mr. Jacoby: $.89305.

Mr. Gowen: Refer to Exhibit No. 7, if you please. What does that statement show?

Mr. Jacoby: Average market price realized for Falcon No. 2 coal from April 1st, 1904, to April 1st, 1905.

Mr. Gowen: On page 3 you show the average for the year, do you not?

Mr. Jacoby: Yes, sir.

Mr. Gowen: What was that?

Mr. Jacoby: $1.21270.

Mr. Gowen: Now, on the cost per ton which you would have been subject to, according to your estimate of cost based on the shipment of the rated capacity of the mine, what would your profit have been —the difference between $1.21 and 89 cents, would it not be?

Mr. Jacoby: Yes.

Mr. Gowen: What is that—thirty-two cents, isn't it?

Examiner Brown: Thirty-one and nine-tenths cents and a fraction; about thirty-two cents.

Mr. Jacoby: Based on the full capacity of the mine?

Mr. Gowen: Yes; haven't you given us the item of thirty-two cents a ton as the difference between the price realized per ton——

Mr. Jacoby: That is arrived at by taking——

Mr. Gowen: What is arrived at?

Mr. Jacoby: Actual sales we were able to make; and in that connection I want to say right here, that in April, 1904, when we took over the mine we were obliged to finance it; I took from another mine an order at $1.15 which extended over a period of three or four months, and was due to the fact that I was borrowing money from them, and was under obligations to the coal company; which accounts for the low average price realized, as taken from the books of W. F. Jacoby & Company; this does not fairly——

Mr. Glasgow: You mean Exhibit No. 7 when you say "this"?

Mr. Jacoby: Yes, Exhibit No. 7. This does not reflect the actual market as it existed during this period, but it does reflect the actual sales as made on the limited quantity of coal we had for sale, due to lack of car supply.

Mr. Gowen: Then your theory is, if the railroad company had supplied all of the operations of these mines with cars up to their full capacity, that a much higher price could have been realized for the coal shipped?

Mr. Jacoby: Our Falcon No. 2 occupied more or less of a separate and distinct place in the market on account of its quality. What others could do, or could not do, I don't know, and it does not affect this case, as far as I am concerned.

Mr. Gowen: That is all.

Mr. Glasgow: As I understand you, Mr. Jacoby, on Exhibit No. 7 you worked out what was the actual

amount, from your books, per ton average received by you through this period for your coal.

Mr. Jacoby: Yes, sir; and the reason that that average is lower is due to the fact that we could not avail ourselves of the high market price, because we always had orders from the previous month left over, at lower prices; and the market went up and we could not get cars to fill lower-priced orders; so that we could not get the higher-priced orders.

Mr. Glasgow: If you had been able to get the cars that you were entitled to, could you have taken advantage of the rising market?

Mr. Jacoby: If we had been able to get the cars we were entitled to, certainly we could have taken advantage of the market.

Mr. Glasgow: I do not understand that your Statement No. 12—look at it—is based upon your shipping your full rated capacity, is it?

Mr. Jacoby: No, sir.

Mr. Gowen: No; No. 6—that is the cost.

Mr. Glasgow: Exhibit No. 12 is based upon your shipping 59.9 per cent. of your full rated capacity, is it?

Mr. Jacoby: Yes, sir.

Mr. Glasgow: Now, No. 6—Exhibit No. 6 is the one to which Mr. Gowen refers?

Mr. Jacoby: Yes.

Mr. Glasgow: On which you show the estimated cost of coal at 89 cents and a fraction, at Falcon No. 2—based on 123,750 tons rated capacity. You mean if you had shipped all the coal that your colliery was rated at, the cost would have been 89 cents and a fraction per ton?

Mr. Jacoby: Yes, sir; and that applies also if we had shipped a trifle less than the full rated capacity.

Mr. Glasgow: During that period how high did the price of coal go?

Mr. Jacoby: One dollar and seventy-five cents. We sold coal, outside of our own, at one dollar and seventy-five cents.

Mr. Glasgow: Outside of your own colliery?

Mr. Jacoby: Yes, sir; during the month of November we bought coal at $1.35 and sold it at $1.45 to $1.65.

Mr. Glasgow: That is all I want to ask Mr. Jacoby.

Examiner Brown: Is that all, Mr. Gowen?

Mr. Gowen: Yes, sir.

(Witness excused.)

Mr. Glasgow read the testimony of Isaac C. Weber as follows:

Isaac C. Weber, called as a witness, and being duly sworn, testified as follows:

Direct Examination.

Mr. Glasgow: Mr. Weber, you were a member of the partnership of W. F. Jacoby & Company?

Mr. Weber: Yes, sir.

Mr. Glasgow: Up to what time?

Mr. Weber: Until April 1st, 1905.

Mr. Glasgow: You were engaged in getting up these statements and exhibits that have been filed here?

Mr. Weber: Yes, sir.

Mr. Glasgow: Take Exhibits Nos. 10 and 11. Did you help make those up?

Mr. Weber: Yes, sir; I did.

Mr. Glasgow: From what information did you make up the statements?

Mr. Weber: They were made up from distribution sheets of the Pennsylvania Railroad.

Mr. Glasgow: Mr. Gowen, there is something you asked Mr. Jacoby about in connection with those statements.

Mr. Gowen: At thirty-two tons per car.

Mr. Glasgow: How did you arrive, on Exhibit No. 10, at the average which you used of thirty-two tons per car?

Mr. Weber: Our records shows we shipped a total of 38,874 tons of coal.

Mr. Glasgow: During the period of what?

Mr. Weber: Running from April 1st, 1904, to April 1st, 1905. That coal was shipped in 1237 cars. If you divide the number of cars by the number of tons actually shipped it averages just 32 tons. In that 1237 cars we shipped all kinds of equipment; we had steel cars, wooden cars—all kinds of cars; some box cars.

Mr. Glasgow: And some were above thirty-two and some below?

Mr. Weber: Lots of them; yes, sir.

Mr. Glasgow: And you took thirty-two as the average?

Mr. Weber: We having shipped that quantity of coal, we thought it was a fair average for the other operations.

Mr. Glasgow: Did you check that up in any way to see whether it was a fair average, taking your own experience?

Mr. Weber: The result of the year's shipments showed 1237 cars, in which there were 38,874 tons, which is an average of 32 tons per car.

Mr. Glasgow: Then you took 308 days as the year's operations?

Mr. Weber: Yes, sir; because there were distribution sheets issued for 308 days.

Mr. Glasgow: Upon the basis that those statements are made up on, you are prepared to say that

they are accurately figured out?

Mr. Weber: Yes, sir; I believe they are; I checked them all up.

Mr. Glasgow: Now, Mr. Weber, during this period, if you had had car service sufficient, would you have been able to move and market the full capacity of your mine?

Mr. Weber: No question about that, at all.

Mr. Glasgow: Why do you say that?

Mr. Weber: Simply because we were refusing orders the greater part of the time—orders we could not fill because we could not get sufficient cars.

Mr. Glasgow: If you had gotten 59.9 per cent. of the rated capacity of your mine, would there have been any trouble in then marketing and moving it?

Mr. Weber: None whatever, for the reason that we had established a branch office in Boston, at a great outlay of money; we were equipped there to handle anywhere from 75,000 to 100,000 tons, in the New England States alone; in fact, we were obliged to buy large quantities of coal outside.

Mr. Glasgow: Suppose you had gotten your 59 and a fraction percentage of the cars, of the tonnage, and you would have gotten thereby something over 44,000 additional tons, would you have been able to sell that excess tonnage at the same, or less, or a greater amount than you actually received for the tonnage which you did ship?

Mr. Weber: Based on the average price per year, we could have gotten a great deal higher price for it. May I explain just how we got up that statement of the average price of coal for the year? That statement was made up by taking the record of bills, duplicate bills showing the billing of each and every separate car shipped during the entire period, the prices varying for different months from $1.15 to $1.35, $1.40,

$1.50, $1.60, and in the months of April, May and June as high as $1.75—for some of that coal. Now, the reason we did that is because we got the actual market price received for coal, which is accurate; the average is accurate. The reason why we could not get any more money for coal was because, in the season of the year when the market was active, the demand was great, and the prices were high, we were more than loaded up by accumulated orders, commitments we had made during lower-priced periods. For instance, in November, I think, we wrote a letter to Mr. Johnston—I think it is in evidence—saying that we had accumulated orders for over 4000 tons then pressing us; we would show the exact number of cars we had and ask for car service to fill those orders. From that period on prices were advancing because of strike talk. We sold coal to outsiders at $1.65—a much lower grade than our own coal; they tried to substitute, but it didn't do the work; and that is the reason why there is a disparity between the actual price received for coal and the price we estimate as the market value.

Mr. Glasgow: In other words, if you had gotten the percentage which you claim, you would have been able to take advantage of the market?

Mr. Weber: Yes, sir; and even sold more tonnage than that.

Mr. Glasgow: What is the average market price you have fixed there?

Mr. Weber: In the original statement, taken from the billing it was——

Examiner Brown: I am speaking of the actual market price——

Mr. Weber: We have taken the average there from each and every month—the market price.

Mr. Glasgow: A suggestion has been made here, and I would like to have your views as to it. If you

had increased your shipments, that is, to 44,000 tons which, according to your claim, would have brought you up to a percentage along with the other mines that you have mentioned, would this additional 44,000 tons have broken the price in the market?

Mr. Weber: Oh, no! That would have been scattered along from month to month; we were always short of coal.

Mr. Glasgow: What is the character of this coal of yours?

Mr. Weber: The character of the coal is such that it has been in direct competition with Big Vein, George's Creek, and Pocahontas coal; in fact, we had a large number of customers who preferred it. I can name a consignee in Jersey——

Mr. Glasgow: The evidence shows it was a very superior steam coal. That is all.

(No cross-examination)."

Mr. Glasgow read the testimony of Mr. Trump, as follows:

"M. Trump, called as a witness, and having previously been sworn, testified as follows:

Direct Examination.

Mr. Gowen: Mr. Trump, prior to the fall of 1905, how had the mines in the various regions tributary to the Pennsylvania Railroad been rated for the purpose of determining their probable shipping output?

Mr. Trump: Rated by the division superintendent in charge, based on actual days' observation and experience with the mines.

Mr. Gowen: Each region, then, was rated separately under the supervision of the superintendent in charge—the railroad superintendent?

Mr. Trump: Yes, sir.

Mr. Gowen: In charge of the lines over which that region shipped?

Mr. Trump: Yes, sir.

Examiner Brown: This, of course, is applicable to the distribution of cars that applies to all of these cases, to the six cases we now have under consideration?

Mr. Gowen: I am entirely willing.

Examiner Brown: It was the individual understanding that the testimony in each of these cases, so far as applicable, would be considered in all six.

Mr. Gowen: That is entirely agreeable to me. What change was made in 1905 with respect to the system of rating, or rather, I should ask, in respect to the supervision over the rating?

Mr. Trump: I started in, about July, 1905, to make an examination of the mines to determine their working places and general characteristics, and on that established our ratings, which were put in effect at different times on the different divisions, but, practically, January, 1906.

Mr. Gowen: Yes. That examination, Mr. Trump, I understand involved the ascertainment, in the first instance, of the physical capacity of the mine to ship, and you then took as another factor in the cost, the commercial side, if I can call it such; that is, the probable ability of the mine to market coal.

Mr. Trump: Yes, sir.

Mr. Gowen: And you combined these two in a certain manner, in order to ascertain the probable shipping capacity?

Mr. Trump: Yes, sir.

Mr. Gowen: Combined these and divided by two, and reached the shipping capacity?

Mr. Trump: I think that was all explained in the other testimony.

Examiner Brown: Yes, it is; your statement is in there, as I remember it.

Mr. Gowen: It was only preliminary to this statement here.

Mr. Glasgow: You counted the physical rating and the shipments as equal factors?

Mr. Trump: Yes, sir.

Mr. Gowen: And divided the aggregate by two?

Mr. Trump: By two.

Mr. Gowen: Now, Mr. Trump, have you had a statement prepared which will show the result of the ratings made about the fall of 1905, region by region, and if so, will you please produce it?

Mr. Trump: I have; yes, sir.

Mr. Gowen: The statement produced, Mr. Examiner, is offered in evidence.

(The paper was received in evidence, and marked "Defendant's Exhibit No. 1," attached to Mr. Trump's testimony.)

Mr. Gowen: Mr. Trump, you first show on that statement, do you not, the rating in force in each region prior to the re-rating made in the fall of 1905, and the percentage which those ratings gave to each region of the whole?

Mr. Trump: Yes, sir; the first column represents the ratings in force by the superintendents immediately prior to the putting in effect of our new system.

Mr. Glasgow: I want to put an objection on the record to this, because I don't think it is material. It is a comparison of the rating in effect, made by the superintendents, and the rating which went into effect May 1st, 1906.

Examiner Brown: No, he says May 1st, 1906, which was the rating established after the matters in controversy in this case were all over.

Mr. Gowen: I think the answer to that is that the

ascertainments of the physical ratings were made in the fall of 1905.

Examiner Brown: The objection is noted, and the witness may answer.

Mr. Gowen: Why were the ratings which were made as the result of the physical examinations made in March, 1905, not put in effect until May, 1906?

Mr. Trump: They were put in effect, but they were on a basis of three months' tonnage, and this revision of May 1st was made in order to get one year's tonnage; that is, taking the tonnage for the entire year as the basis of the commercial side of the question.

Mr. Gowen: Yes.

Mr. Trump: The results are produced; but, as I say, we put this in by regions. The entire Tyrone region was the first that went in; in November, 1905, I think it was. We had to put them in by piece-meal.

Mr. Gowen: What was the percentage of the physical rating of the mines in the Tyrone region in existence prior to the examination made under your supervision in the fall of 1905?

Mr. Trump: Nine and six-tenths per cent., exclusive of the Snow Shoe, and nine-tenths of one per cent. for the Snow Shoe.

Mr. Gowen: As the result of the examination of all the mines under your supervision, which was the new percentage established for the Tyrone region—percentage of the whole?

Mr. Trump: Eight and six-tenths per cent. The relative percentage the physical rating of the region bore to the total was eight and eight-tenths per cent.

Mr. Gowen: Compared with previous rating of nine and six-tenths—is that correct?

Mr. Trump: Yes, sir.

Mr. Gowen: And as the result of including the commercial factor, what was the rating finally established for the Tyrone division?

Mr. Trump: Eight and six-tenths per cent.

Mr. Gowen: Now, Mr. Trump, I wish you would just state what the examination developed as to the physical capacity of the mines tributary to the Pennsylvania Railroad—what tonnage were those mines capable of shipping, according to your examination?

Mr. Trump: Thirty-four per cent. That is our shipments for the year.

Mr. Gowen: No, no; what was the physical capacity of the total—the aggregate physical capacity of the mines to ship, as developed by the examination?

Mr. Trump: Nine thousand seven hundred and sixty cars per day—of thirty-five tons to ship, as developed by the examination?

Mr. Trump: Nine thousand seven hundred and sixty cars per day—of thirty-five tons.

Mr. Gowen: What had been the average daily shipments of all the mines for the year preceding May 1st, 1906?

Mr. Trump: Three thousand three hundred and seventeen cars of the same capacity.

Mr. Gowen: So that the physical capacity exceeded the actual shipments to the extent of almost three times?

Mr. Trump: Yes, sir.

Mr. Gowen: Have you had prepared a statement from our car-distribution sheets which shows the total region rating of the Tyrone region, in cars, month by month, commencing April, 1904, and ending October, 1905, and the number of cars placed in the region; those being separately collated under the head of Company Coal, Individual, and Commercial cars?

Mr. Trump: Yes, sir.

Mr. Gowen: Is that the statement (handing witness a paper)?

Mr. Trump: Yes, sir.

(The paper was received in evidence, and marked "Defendant's Exhibit No. 2," attached to Mr. Trump's testimony.)

CROSS-EXAMINATION.

Mr. Glasgow: Referring to Exhibit No. 2, there; for the month of April, 1904, the Tyrone region rating, in cars, was 18,434, was it?

Mr. Trump: Yes.

Mr. Glasgow: Is that cars of thirty-five tons capacity?

Mr. Trump: Those were cars of twenty-five tons capacity?

Mr. Glasgow: Twenty-five?

Mr. Trump: Yes, sir. Our distribution, Mr. Glasgow, was based on the fact that one steel car of fifty tons capacity was equal to two wooden cars; in other words, when we gave a man a steel car, he was entitled to two cars; that one steel car representing his proportion of two. Wooden cars were of varying capacities, and as a matter of convenience, we simply made the two classes.

Mr. Glasgow: So that it was 18,434 cars of 25 tons capacity?

Mr. Trump: Yes, sir. In other words, it means that the steel cars were multiplied by two, as the distribution was made on that basis.

Mr. Glasgow: During that month there were 958 company coal cars assigned. Are those 25-ton cars?

Mr. Trump: All reduced to the wooden-car basis; yes, sir.

Mr. Glasgow: And the individual cars were 1526?

Mr. Trump: Yes, sir.

Mr. Glasgow: Making a total of 2484——

Examiner Brown: Or a grand total, as I see it, here, of 5718?

Mr. Glasgow: Yes, including commercial.

Examiner Brown: Yes, sir.

Mr. Glasgow: Now, the only cars which were divided, Mr. Trump, on the percentage basis were the cars under the head of "Commercial Cars Placed," for that month, of 3234?

Mr. Trump: That was the system under which we were working at that time.

Examiner Brown: Mr. Glasgow, let me ask a question there. I want to understand this total. You say the region rating in cars was 18,434; what do you mean by that?

Mr. Trump: That was the sum of the ratings on the sheets for the month.

Examiner Brown: That is, if you added all the ratings together and you furnished all the cars that these ratings made, it would be 18,434?

Mr. Trump: Yes, sir.

Examiner Brown: According to this, you supplied but 5718, or approximately less than one-third of the number of cars to which that region was entitled; did you not?

Mr. Trump: Yes, sir.

Examiner Brown: Is that about the average of your supply of cars for all the coal mines you have got?

Mr. Trump: Yes, sir; the ratings are very liberal compared with the production.

Mr. Glasgow: Mr. Trump, were those what you call "assigned cars" which, during the month of April, 1904, were placed on the Tyrone division, charged against the percentage which the Tyrone division was entitled to of the whole equipment?

Mr. Trump: I do not know that I quite catch that.

Mr. Glasgow: Well, in your Exhibit No. 1 you show that prior to the time that you took up the matter

of rating the mines, Tyrone division was entitled to 9.6 per cent. of all the cars in service.

Mr. Trump: Yes.

Mr. Glasgow: Now, as against that 9.6 per cent. did you charge Tyrone division with the cars which, under your Exhibit No. 2, are classed as assigned cars, to wit, "Company Coal" and "Individual" cars?

Mr. Trump: Yes, although, as I explained to you before, we had no elaborate records on that; but we did distribute cars between regions based on the tonnage output.

Mr. Glasgow: What I mean, is, you as a matter of fact, charged against the 9.6 per cent. to which Tyrone division was entitled—you charged against that percentage the company coal cars and the individual cars which went to the Tyrone division.

Mr. Trump: Charged everything, as nearly as we could; yes, sir.

Mr. Glasgow: After you got these individual cars and the company coal cars on the Tyrone division, having charged them against the Tyrone's percentage, you then gave these assigned cars to certain mines on the Tyrone division, but did not charge them against those mines: that is correct, is it not?

Mr. Trump: Theoretically we could not charge them against the mine, according to our practice; but practically, they did not get company cars that they were entitled to; those cars going to the other shippers: so it was a very difficult matter——

Examiner Brown: Wasn't it January 1st, 1906, that your company issued its new order that company coal assigned cars should be counted against the capacity of the mines?

Mr. Trump: We deducted it; yes, sir.

Examiner Brown: Prior to that time did you deduct?

Mr. Trump: Not theoretically, that was not our practice; but practically, yes. I would like to explain. You take the cars as shown by your statements that the Berwind-White Coal Mining Company received; practically no Pennsylvania Railroad cars, although under our method at that time they were entitled to their proper percentage, in addition to their individual cars. Now, the fact that they did not get our cars upsets the theoretical calculation to a very large extent. Those cars were placed with the other operators, who received more than their theoretical percentage, based on our method in effect at that time; that is, an analysis of our sheets, based on the method in force, shows in every single instance that the individual cars, only, was discriminated against; and those who did not get more than their share. If you are going to apply some new theory—a decision of the Interstate Commerce Commission, or the various decisions of the courts that we have, you have got to figure the totals out in accordance with those various decisions; but we cannot sit up and do that when we are running cars.

Mr. Glasgow: The Lehigh Valley Coal Company, during the period from April 1st, 1904, to April 1st, 1905, had of the Lehigh Valley cars 4267; and had of the Pennsylvania Railroad cars 4271; so you seem to have given them one car of the Pennsylvania Railroad practically for every car that they had of the Lehigh Valley. Was that the arrangement as to them?

Mr. Trump: The arrangement was that they put their own cars in there, as a rule. You will find that some of the time we had no cars there at all; at other times we put in our cars liberally, on the understanding that that was their fuel supply.

Mr. Glasgow: But they got their full percentage of the Pennsylvania cars, notwithstanding that, and a like amount of assigned cars?

Mr. Trump: I could not tell that from your figures.

Mr. Glasgow: That is getting away from the point I was directing your attention to, and that was this: that while the cars were charged—the individual cars and the company fuel cars—while they were charged against the Tyrone division, and necessarily while they were charged in that way against every mine on the division, still, when you got them on the division they were apportioned to certain mines and not charged against their percentage, up to January, 1906.

Mr. Trump: Yes, sir, according to our theoretical practice.

Mr. Glasgow: Then, in January, 1906, for the first time, you made the change to which you have referred?

Mr. Trump: Yes, sir.

Mr. Glasgow: And the comparison on your Exhibit No. 1, part of it, under the heading, "Ratings in effect May 1st, 1906,"—that was not in effect during the time covered by the claim referred by Mr. Jacoby?

Mr. Trump: No, sir; it simply shows how the ratings were proportioned to our old ratings.

Examiner Brown: During the time that is covered by this complaint, was your motive power adequate to carry all the individual and company cars and make what you would consider an equitable distribution of commercial cars?

Mr. Trump: We were pretty short of motive power in 1904, and perhaps during the winter of 1904-1905. I would like to explain that being short of motive power is the inability to keep our cars moving all the time. That is the ideal. We have always had a very liberal supply of motive power on the Pennsylvania Railroad, but by the addition of some four or five hundred engines, we were enabled to move it faster—to

keep cars moving, which we thought would be a matter of economy.

Mr. Glasgow: Mr. Trump, in the statement which we have made up from your distribution sheets, it shows that the Falcon mine, during the period we have had under consideration, was rated at 450 tons a day, and that on that rating, from April 1st, 1904, to April 1st, 1905, it shipped 1237 cars. Now, Leland Mine No. 1, from April 1st, 1904, to October, 1904, was rated at 200 tons—less than half of the Falcon—and from October to the following March, 1905, it was rated at 400 tons—less than 450, the rating of the Falcon; and Leland shipped during that period 2122 cars, as against 1237 by Falcon.

Mr. Trump: I assume that includes Leland's individual cars.

Mr. Glasgow: I suppose it does, yes—probably does. Now, on the basis of those shipments of individual cars, when you came, in 1906, to put on the commercial feature of your system of car distribution, the fact of Leland having shipped nearly double as many cars in the previous year as Falcon was greatly to its advantage under the system of rating which you inaugurated January 1st, 1906; was it not?

Mr. Trump: Yes, sir.

Mr. Glasgow: That is all.

Mr. Trump: Based on Judge's Goff's opinion that you should take, after getting the working places and the restricting factors of a mine, you should also ascertain its ability to market the product; and certainly individual cars have a certain ability to market product——

Mr. Glasgow: Is that the Kingwood case you refer to?

Mr. Trump: Yes, sir.

Mr. Glasgow: Did Judge Goff take the position

that the commercial feature should cut a feature in rating mines?

Mr. Trump: He considered it, as well as the sidings, and everything in connection with the mines.

Mr. Glasgow: I don't think there is any occasion to go into that on the record; I think you had better have that cut out.

Examiner Brown: He has explained why he put that in; he gave that decision to his people——

Mr. Trump: I gave that to our inspectors. I think it is a very good thing.

Mr. Gowen: Mr. Glasgow asked you, Mr. Trump, whether in determining the number of cars which should go into the Tyrone division any day, you took account of the so-called assigned cars; that is, the individual and company fuel cars; in that respect did you treat the Tyrone region differently from any other region?

Mr. Trump: Not at all.

Mr. Gowen: All regions were treated the same way?

Mr. Trump: Yes, sir.

Examiner Brown: I believe the record also explains; I don't know that it was fully explained, but if not, I wish you would go into it, Mr. Trump. As I remember it, Mr. Jacoby bought some individual cars at one time, and in some way he was not allowed to put them into service. What have you to say about that?

Mr. Trump: I am not very clear on that now; I think there was some reason why——

Mr. Jacoby: The testimony was in Clark Brothers case; the option existed during the time I owned these mines and when I turned them over. It is in Clark's testimony.

Mr. Gowen: We have nothing more. I am asking, of course, Mr. Glasgow, that if we should discover

any clerical errors in these statements which you got out, as to our car distribution—in the compilations made from the distribution sheets, we shall have opportunity to call attention to them."

Mr. Glasgow: If your Honor please, I offer in evidence the report of the Commission (Interstate Commerce Commission), reported in Volume 19, I. C. C., page 392.

It reads as follows:

"REPORT OF THE COMMISSION.

Harlan, Commissioner:

The mines of the complainant in Hillsdale Coal & Coke Co. v. P. R. R. Co., just disposed of (ante, p. 356), are located near the town of Glen Campbell, in Indiana County, in the State of Pennsylvania, on the Cush Creek branch of that part of the defendant's Cambria and Clearfield division which extends northward from Cresson; and the chief competitor of that complainant has been D. E. Williams & Company, whose mines are in that district. In the above-entitled complaints the mines are in another mining district in the bituminous coal regions of Pennsylvania and on another part of the Cambria and Clearfield division of the defendant."

Mr. Glasgow: I am referring now to the report of the Commission on the testimony which I have read to the jury:

"They are located about nine miles west of Osceola Mills, in or near the town of Smoke Run, in Clearfield County, on what is known as the defendant's Moshannon branch, which, at Osceola Mills, joins its so-called Tyrone division extending northward from its junction with the main line at Tyrone. Since October, 1905, the Clark Brothers Coal and Mining Company has operated, under leases, three mines known as Falcon No. 2,

No. 3 and No. 4. The largest and best equipped of these mines known, Falcon No. 2, was operated prior to that time by the petitioner, W. F. Jacoby & Company, which had taken over the lease of the mine in April, 1904.

"It is Falcon No. 2, and the period from April, 1904, to October, 1905, that are involved in the first of the above-entitled complaints. That mine is said to be one of the best equipped collieries in the district, and on April 1, 1904, had an inventory valuation of $30,000. It is provided with an underground electric system for hauling its mine cars and with a first-class wooden tipple and a patent dump; it is also well supplied with mine cars and has ample switch-track facilities; and its grades favor the out movement of loaded mine cars. There are said to be from 175 to 200 acres of solid coal in the three Falcon mines, varying in thickness from 2½ to 5 feet; and in No. 2 mine there were, in 1904, about 100 acres of coal remaining, some 30 acres having been mined prior to that time. The coal is accepted as a superior grade of steaming coal that is readily marketed in New England, New Jersey, New York and Pennsylvania, being shipped all rail over the defendant's lines to those points and also to tide water.

"It is not contended that there was any unfairness in the rating assigned to Falcon No. 2 during the period from April, 1904, to October, 1905, when it was being operated by the complainant, W. F. Jacoby & Company. The rating then given to it was 450 tons a day, and this the complainant in that case admits was a close approximation of its actual output capacity. It appears, however, that from October, 1905, to May, 1907, when Falcon No. 2 was being operated by the Clark Brothers Coal and Mining Company the rated capacity credited to the three Falcon mines was 9 cars or 315 tons for No. 2, 1 car or 35 net tons for No. 3, and 2 cars or 70 net tons for No. 4, making a total capacity of 12 cars or 420 tons for the three mines. In April, 1907, these ratings

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were increased to 13 cars or 455 tons for Falcon No. 2, 2 cars or 70 tons for Falcon No. 3, and 5 cars or 175 tons for Falcon No. 4, making an aggregate capacity assigned to the 3 mines of 20 cars or 700 tons daily. The complainant in the second of these complaints, in support of the theory, advanced also in the Hillsdale Coal and Coke Co. v. P. R. R Co., ante, that commercial capacity ought to be eliminated, calls attention to the fact that the defendant in its answer admits that during the period in question the actual physical capacity of the three Falcon mines was 709 tons, 144 tons and 270 tons, respectively, or a total of 1133 tons in all, which would require 31.1 cars daily to move. On the other hand, it is to be noted that the petitioner in the second complaint contends that the physical capacity of the 3 mines was only 600 tons, 125 tons and 300 tons, respectively, or 1025 tons in the aggregate per day. Finally it must be observed that neither of the petitioners made complaint to the defendant, at that time, of the ratings, of these mines, and when finally they did complain, the defendant accepted their engineer's statement or estimate as to the actual working capacity. Under these circumstances, we see no substantial basis for any finding of discrimination against the complainants with respect to the defendant's ratings of their mines.

"The damages sought to be recovered in the first of these complaints amount to $51,950.49 and in the second complaint to $36,901.13. Falcon No. 2 was purchased from the Penn Collieries Company, in which W. F. Jacoby seems to have been interested. The transaction appears of record as a purchase, but it may have been a mere change of ownership on the basis of nominal values. Nevertheless, the record shows a purchase price of $25,000 and that W. F. Jacoby & Company retained the mine until October, 1905, when they sold it for $32,500, or for $7500 more than they paid for it. In the meantime they had mined 55,000 tons of coal and sold it apparently at a profit of about 30 cents a ton. Whether the mine could have been

sold so well if more coal had been taken out of it by the complainant is a question as to which it is difficult to arrive at any satisfactory conclusion. It is to be noted, however, that the complainant claims to have had actual orders for a substantial portion of the output capacity of Falcon No. 2.

"As we understand these cases, the substantial points upon which discrimination may be predicated are as follows:

"There are a number of mines on the Moshannon branch of the defendant that are owned by other operators, but in this connection it will suffice to mention only the six mines operated by or for the Berwind-White Coal Mining Company, one of which, known as Eureka No. 27, immediately adjoins the complainant's Falcon No. 2. The same "D" coal vein is worked in these two mines. The quality of the coal is therefore the same and it is claimed that the capacities of the two mines were substantially the same at the period involved in the first two of these two complaints. Falcon No. 2 is said in fact to have been better equipped, and if this was the case it would seem to have had an advantage over its neighbor if it had been placed on an equal footing in the matter of car supply.

"But neither Falcon No. 2 nor the mines of the complainant, the Clark Brothers Coal and Mining Company, was placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of distribution of the defendant's available coal-car equipment during the period of the actions.

"During years 1902, 1903 and 1904, the employees of the defendant that were in charge of the distribution of coal-car equipment had special orders for giving to the Berwind-White Coal Mining Company a special allotment of 500 cars daily. That company had contracts for supplying coal for certain steamships sailing from New York Harbor. Complaint had been made that these steamers were frequently delayed because

of a lack of coal, and the defendant felt that it was warranted in making that special arrangement with the coal mines that had undertaken to supply them with fuel. This preference was the occasion of comment by the Commission in its report in the coal and oil investigation. Few, if any, of these specially assigned cars reached the Berwind-White mines in this particular mining district, and therefore it is difficult to determine to just what extent these complainants were prejudiced by that preference of a competing company's operations in another district; nevertheless, it was inequitable in principle and undoubtedly so to some extent at least in its results, and we see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference of one company and district and an undue discrimination against coal operations in another district.

"Another point also mentioned in our report in the coal and oil investigation just referred to is that 1000 of the defendant's own system coal cars were sold by the defendant to and were thus made available by the Berwind-White Company. The defendant to that extent diminished its capacity to supply the coal-car requirements of other coal operations upon its lines. While the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will not be considered in this report, the least that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors.

"It is established with reasonable clearness on the record that the Berwind-White mines during the years 1906 and 1907, as well as to a period immediately preceding those dates, were daily in receipt of coal cars, in large numbers, and were therefore kept in operation almost continuously while the complainants received an inadequate

supply and were not able, therefore, to run their mines to the best advantage. This difference is largely explained by the fact that the Berwind-White Coal Mining Company owned a large number of private cars and also enjoyed contracts for supplying the defendant and its connection with coal. Under the rules of defendant, fully explained in Hillsdale Coal & Coke Co. v. P. R. R. Co., ante, the ownership of such private cars and the enjoyment of these contracts resulted in the special allotment to the mines of that company of these so-called assigned cars. For the reasons explained at some length in that case those rules operated as an undue discrimination against these complainants, and we so find. But for the present and for the reasons there explained we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby.

"An order will be entered in accordance with these conclusions."

Mr. Glasgow: If your Honor please, I now offer the order of March 7, 1910, by the Interstate Commerce Commission, leaving out the heading. It reads as follows:

"These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its line for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and sys-

tem fuel cars, in the record herein referred to as 'assigned cars,' from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all 'unassigned' cars:

"It is ordered, That the said rule, regulation and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

"It is further ordered, That the defendant be, and it is hereby notified and required, on or before the 1st day November, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

"And it is further ordered, That the question of the damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises."

Mr. Glasgow: That is the order entered. I desire to offer, if your Honor please, the supplemental report of the Commission in this case as of March 11, 1912. I call attention in offering that report to so much of it as applies to the claim of Jacoby & Company.

This is the report of the Interstate Commerce Commission—the supplemental report of March 11, 1912. It reads as follows:

"CLAIM OF JACOBY & COMPANY.

"We find that by reason of the discriminations ascertained and set forth in our report in Jacoby v. P. R. R. Co., 19 I. C. C. 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907.

"The claimants here demand $51,950.49. The award above made we base upon evidence adduced of record from which we find:

"(a) That the fair rating of the mine for the time in question as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

"(b) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days; and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days.

"(c) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

"(d) That the average selling price of the complainants' products for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures the loss on the tonnage which the complainant was unable to ship.

"(e) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049 per ton during the second

period, making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based on a fair car supply as heretofore stated. This is the basis adopted for computing the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.

"We further find that the complainants in the sale of their mine realized a profit of $7500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded."

Mr. Glasgow: We also offer in evidence the order of the Interstate Commerce Commission, as follows:

"No. 1139.

"W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company,

v.

"The Pennsylvania Railroad Company.

"This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C. 392, and all the findings and conclusions in said reports are hereby referred to and made a part hereof:

"It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the first day of June, 1912, the sum of $21,094.39, with interest thereon, at the rate

of six per cent. per annum from June 28th, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust as more fully and at large appears in and by said reports of the Commission."

ISAAC C. WEBER, having been duly sworn, was examined and testified as follows:

By MR. GLASGOW:

Q. Were you a member of the firm of W. F. Jacoby & Company?

A. Yes, sir.

Q. Mr. Jacoby is dead, I believe?

A. Yes, sir.

Q. When did he die?

A. About a year and a half ago, I think.

Q. You are, then, the surviving partner of that firm?

A. Yes, sir.

Q. And your firm, as I understand it, W. F. Jacoby & Company, took over the Falcon No. 2 mine in the Tyrone division on April 1, 1904, and thereafter operated the same?

A. Yes, sir.

Q. And how long did they operate it?

A. One year and six months.

Q. To what date?

A. October 18, 1905.

Q. And did you remain a member of the firm during that time?

A. I was not a member of the firm after April 1, 1905.

Q. What was the rated capacity of the Falcon No. 2 mine?

A. Four hundred and fifty tons per day.

Q. How much?

A. Four hundred and fifty tons per day.

Q. Have you made the calculation or aided in making the calculations as to how many days the Falcon No. 2 mine actually operated between the 1st of April, 1904, and April 1, 1905?

A. Yes, sir.

Q. How many days was that?

A. Two hundred and seventy-three or two hundred and seventy-five; I have forgotten which.

Q. Two hundred and seventy-five?

A. Two hundred and seventy-five, I think it was.

Q. Two hundred and seventy-five?

A. During the first period, and 138¼ days——

Q. You mean from April 1, 1905, to October 18, 1905, 138¼ days?

A. Yes, sir.

Q. Now based upon its rated capacity of 450 tons a day for the first period you have mentioned, what would have been the shipment from the Falcon No. 2 mine if it had received cars for its rated capacity, and had shipped the rated capacity, how many tons would it have shipped for the first?

A. During the first period?

Q. Yes.

A. 123,750 tons.

Q. How many tons did the Falcon No. 2 actually ship during that period?

A. 38,714 tons.

Q. Then, the difference between those is what amount?

A. 85,036 tons.

Q. In other words, if it had received its rated capacity, and shipped the same, it would have shipped 85,036 tons additional?

A. Yes, sir.

Q. At the average profit which the Interstate Commerce Commission found for the first period of 29.2 per ton, what would have been the profit the Falcon No. 2 would have made if it had shipped its rated capacity?

(Objected to as irrelevant.)

THE COURT: What is the purpose of this question?

MR. GLASGOW: This is to show the damage we suffered by not giving us our rated capacity.

MR. GOWEN: He is at present asking the witness to testify as to the extent of the damage sustained, not because of the discrimination in the car supply, which he claims we were guilty of, but because we did not deliver to the plaintiff the full rated capacity of his mine. I object to the testimony on that point on the ground that it has no relevancy.

MR. GLASGOW: My purpose is to follow this, because we now have the record in evidence, which we did not have in the record here before in the record of this court, because then the entire record was not put in—it was before the Interstate Commerce Commission—that the Pennsylvania Railroad Company arbitrarily assigned to the Berwind-White Company, as the Commission refers to in this record, 500 cars per day, which were not used on the Tyrone division; that they also sold out of their equipment to the Keystone Coal and Coke Company, Ellsworth and the Berwind-White Company 2200 cars per day, which Mr. Hutchinson states in his testimony was an equivalent that would enable them to make a distribution of 140 cars a day, 2200 moving and going; that 140 plus the 500—Mr. Jacoby in the testimony I have just read testified that that would have given to the Pennsylvania Railroad Company 640 cars for dis-

tribution by it over its entire system in accordance with the percentages that each division was entitled to. That is already in evidence, introduced here and read—640 cars a day. It is also in evidence that the Tyrone division, in other words, the Snow Shoe, which is treated in these distribution sheets as the same, was entitled to 10.5 per cent. of the cars that the Pennsylvania Railroad Company had for distribution as between its divisions, which gives 67 cars which the Tyrone division would have gotten if the arbitrary assignment of the 500 cars and the sale of its equipment had not taken place, which was condemned by the Commission in this first report to which I have referred. Now, if we had those 67 cars—if we had them on the Tyrone division, over and above the distribution which the Pennsylvania Railroad had made, the Pennsylvania Railroad Company would have had enough cars, if they brought them, as they rightfully should, to that division, to have given us our full rated capacity, and the only reason they did not have those cars there was because they gave 500 arbitrarily to Berwind on another division and sold 1000 to Berwind, 500 to the Keystone, as the Commission says, and 700 to Ellsworth, which practice the Commission condemned in this first report. If your Honor please, the jury may take the view that we are not entitled to our full capacity, but I am entitled to show the jury what the condition would have been if they had made the distribution in accordance with what the Commission in this first report recommends—it may be that the jury will find—I am going to put it to them in several ways—that we ought not to have gotten more than Berwind and the other 20 preferred shippers—that is, 59.9 per cent., but I intend to show that if those 67 cars had come

to the Tyrone division, as they should have come, and as the Commission says in this first report they ought to have had come, that the railroad company would have had plenty of cars with which to have brought all the shippers on the Tyrone division up to 59 per cent. and then had some cars over. That is the theory upon which I am proceeding here, sir.

MR. GOWEN: If your Honor please, the record shows that there was submitted to the Commission the claim based upon the so-called 500 cars order in favor of Berwind-White—and the claim —it was not presented in a claim—based upon the sale to Berwind-White. That was before the Commission—that fact. The Commission declined to award any damages upon the theory that either that 500-car order, which Mr. Glasgow refers to, had any effect whatever upon the number of cars which the plaintiff would have received, or that the sale made of the cars had any effect upon the number of cars which the plaintiff would have received. They have found that they were entitled to receive additional cars to those which went into the Tyrone division, in addition to those which they did receive, and that is the basis of the Commission's award. Certainly, when we come to an action to enforce that award, the plaintiff cannot be permitted to sustain the award of the Commission upon grounds which the Commission declined to rest its award on. With respect to the question of the failure to receive the full amount of the rating of the mine, the plaintiff is in this situation. In his petition to the Commission he asked for damages both upon the ground of discrimination and upon the ground of the failure of the defendant to allot him all the cars or to give him all the cars he had requested. The Commission based its

order entirely upon the ground of discrimination. After this case had been tried, as the record shows, and after the decision had been rendered by the Supreme Court, Mr. Glasgow filed a petition with the Commission setting up the decision of the Supreme Court and the fact that the Commission had made its award upon a wrong basis, and he asked that the case be re-opened in order that he might be enabled to present the other claim, namely based upon the inadequacy or failure to furnish all the cars asked for, and that petition was denied by the Commission. It seems to me, from any aspect of the case, impossible that he can at the present time now seek to recover an amount which the Commission awarded upon the grounds which they specifically denied.

Mr. Glasgow: I propose to show that if the Pennsylvania Railroad Company had made a distribution of their cars, which the Interstate Commerce Commission would have approved, that they would have taken the 500 cars to Berwind and the 140 cars which they had disapproved the sale of, and made a distribution among the divisions, and we would have gotten 67 in the Tyrone division, which would have been not only enough to bring it up to the 59.6 per cent., but would have been enough to give us our full rated capacity.

The Court: As I understand it, this suit is based upon a finding of the Commission of discrimination and the Commission made an award of damages. Their finding of discrimination is conclusive. In the Commission's report with regard to the defendant's cars sold to the Berwind-White Company, on page 395, while they say "The defendant to that extent diminished its capacity to supply the coal car requirements of other coal operations upon its lines," they also say, "While

the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will not be considered in this report, the least that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors," but it seems to expressly refrain from basing its finding of discrimination on the sale of the coal cars.

MR. GLASGOW: It says, "It indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors."

THE COURT: Yes. "It indicates a desire to," but it expressly says that it cannot find that that is illegal.

MR. GLASGOW: It says it does not pass on that particular point.

THE COURT: No. It surely does not. Therefore, in the report that I have seen—of course you may be able to point out something—there is nothing in the report that I see that makes that a basis of its finding of discrimination.

MR. GLASGOW: If your Honor please, the Commission would have to say, "We find this to be a discrimination," and while they say this, "While the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will not be considered in this report, the least that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors." If your Honor please, if that is not discrimination, I do not know what it is.

THE COURT: "Discrimination" is what is defined as "discrimination" in the act.

MR. GLASGOW: That is, to forward the interests of one party at the expense of his competitor.

THE COURT: Is there anything on the record to show that this special allotment of 500 cars daily—as I understand it, they were Berwind-White Company owned cars—as to whether they were not the same cars referred to in this case?

MR. GLASGOW: Yes, sir; they were. That was read in the testimony. Those 500 cars was a special allotment that was directed to be made daily to the Berwind-White Coal Mining Company before any distribution was made in order to take care of the Berwind Company of their freight to the Harsimus Pier.

THE COURT: They were not private cars?

MR. GLASGOW: They were not private cars at all. They were Pennsylvania cars.

MR. GOWEN: I beg your pardon.

MR. GLASGOW: No, the 500 cars——

MR. GOWEN: Yes, they were private cars.

MR. GLASGOW: No, that does not so appear.

MR. GOWEN: Mr. Trump so testified.

THE COURT: The impression I got was that they were privately owned cars.

MR. GLASGOW: They were 500 cars belonging to the Pennsylvania Railroad Company, and they were ordered to make the distribution to the Berwind-White Coal Mining Company for Scalp Level before placing any other operations on the Scalp Level region.

THE COURT: Where did that appear.

MR. GLASGOW: That is in the testimony of Hutchinson, which I am going to read to your Honor. That was referred to by Mr. Jacoby in

which testimony which I read. I will point your Honor out that testimony. Page 168. Look at page 168. You will find the testimony which I read. If your Honor will begin at page 164 and read a few pages on you will see what that is.

THE COURT: Mr. Jacoby says on page 164: "640 cars per day, we figured up from the testimony, were the cars sold to other shippers and arbitrarily assigned to the Berwind-White Coal Mining Company, to which the Tyrone division would have been entitled." Then a little farther down the page: "Mr. Glasgow: What constituted these 640 cars? What were they? Mr. Jacoby: 500 cars arbitrarily assigned to the Berwind-White Coal Mining Company, and some cars sold by the Pennsylvania Railroad Company to them and the Keystone Coal and Coke Company. Mr. Glasgow: What were the other 140? Mr. Jacoby: They were the ones that were sold." Now, from his answer at the foot of page 164 it looks as though the whole 640 were sold.

MR. GLASGOW: No, sir. If you will read there, your Honor, you will see that these 500 cars were the cars that were arbitrarily assigned, and the 140—that will be fully explained from Mr. Hutchinson's testimony a little further on that Jacoby quotes. He says: "The 140 were the ones that were sold."

Page 166. "Mr. Glasgow: You tell us, Mr. Jacoby, that your estimate of 500 of these 640 cars per day covers cars which were assigned to the Berwind-White Company as arbitrary cars? Mr. Jacoby: Yes, sir. Mr. Glasgow: Where did you get the remaining 140 cars; how did you arrive at that number? Mr. Jacoby: I got that 140 from testimony given by Mr. Hutchinson before the Interstate Commerce Commission in which he

says that 'these 2200 cars, I suppose, that would equal 140 cars a day in the movement, roughly.'" The 2200, I will show your Honor from Mr. Hutchinson's testimony, were the 1000 sold to Berwind, 700 to Ellsworth and 500 to Keystone, making 2200, and the 140 were the daily movement, which with the 2200 cars enabled the Pennsylvania Railroad to assign—he says, "I used that as a basis. Mr. Glasgow: Who is Mr. Hutchinson? Mr. Jacoby: He was then General Manager of the Pennsylvania Railroad Company, at the time this testimony was taken." Then Jacoby's testimony shows the 500 cars arbitrarily assigned. Then Trump's testimony also shows 500 cars arbitrarily assigned to Berwind, and which Jacoby says were not used on the Tyrone division,—2200 cars, 1000 sold to Berwind and 500 to the Keystone and 700 to Ellsworth, which the Commission says "Indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors"; that the 2200 cars so sold, if they had kept them, would have enabled them to make a distribution of 140 cars a day to the different divisions of their road, making 640 cars a day which they could have distributed, if they had not preferred these people on other divisions of the railroad, and of the 640 cars per day the Tyrone division was entitled to 10.5, which makes 67 cars a day that they would have had for distribution in that division, outside of the distribution that they already made, and that the 67, as we will show your Honor by calculations that we can make on this record as it stands, would have more than permitted the Pennsylvania Railroad Company to bring the Jacoby Company and all of the other shippers, outside of the 20 preferred, up to 59.6 per cent. and

in excess thereof, if they had distributed them as the Commission says they should. We do not find here specifically in this record what was exactly the damage which Jacoby suffered by reason of this arbitrary distribution to Berwind, but we supplement that by showing that while we do not say what was the exact amount which he suffered by reason of this 500 arbitrary distribution and the sale of the cars, we do show that if they had brought those cars into the division, as they ought to have brought them in, the distribution on the Tyrone division would have been enough to have given all the shippers on the Tyrone division, except those 20 named, an amount sufficient to bring them up to their proper amount of 59.6, which was lacking in the Supreme Court. That was exactly what was lacking. I did not do what was done in the Minds case, put in the whole record before the Commission. I believe today that the record that your Honor tried this case on is sufficient, but the Supreme Court differed with us, and they affirmed the Minds case when they brought the whole record before them from the District Court.

THE COURT: Mr. Glasgow, as I regard the statement of the Commission here, it is merely an observation that 1000 of these cars were sold by the defendant to be made available by the Berwind-White Company, and they declined to pass on that as a legal proposition and the right of the railroad company to do it, and said, "It merely indicates a desire on the part of the defendant." Of course, the Commission did not find discrimination based on a mere desire.

MR. GLASGOW: No.

THE COURT: If it is proposed to show that these 1000 cars were assigned to the Berwind-

White Company, or to somebody else, so as to keep them off of this division, then I would say that this question would be admissible, but as the record stands now I do not think it is. I will sustain the objection.

(Exception noted for the plaintiff, by direction of the Court.)

Mr. Glasgow: Of course, your Honor, it was read in the testimony while you were out of the room that those 1000 cars were not used on this division at all.

The Court: Did the testimony show they were used anywhere?

Mr. Glasgow: Yes. It shows they were sold to the Berwind-White Company, and used on another division. Let me find that, because I think it is pertinent for your Honor to see that.

The Court: It is so near the hour of adjournment that it will not be worth while to keep the jury here any longer.

(Jury excused.)

(Argument.)

(Court adjourned until Monday, October 27, 1919, at 10 o'clock A. M.)

SECOND DAY.

Philadelphia, Pa., Monday, October 27, 1919.

Present: Parties as before noted.

Mr. Glasgow: If your Honor please, I was called up last night from Mr. Weber's home, and was told that he was sick in bed, and the doctor said it was dangerous for him to think of getting out. They gave me the name of the doctor at

Norristown. Dr. Hunsberger at Norristown. I called the doctor up and he said he had been attending Mr. Weber yesterday and the day before, that he was in bed with a very high temperature, and that he was going to see him again last night. I asked him, if there was any change for the better, if he would advise me. He said he would. I then asked him whether he thought it was possible that we could get Mr. Weber sometime this morning so that we could finish his testimony. He said with the temperature he had that he would not be responsible, that he thought it would be dangerous to the man's life to come out. I asked him how long before he thought it would be before I could get Mr. Weber and he said it would be several days before Mr. Weber could with safety come out. I, of course, dislike to ask any indulgence, but I do not know what else to do. He is the only man I have, and if your Honor could in any way hold this matter over to a later date, with the jury sworn, I would feel grateful.

THE COURT: Yes. Mr. Gowen, have you any suggestion to make?

MR. GOWEN: Of course, I have no objection to that.

THE COURT: I presume you will want the witness here on the stand? You could not agree on what he would testify to?

MR. GLASGOW: I do not think so, because I have had him making some calculations based upon the evidence that he alone has made.

THE COURT: Of course, it is rather difficult now to fix a time if the man is in a serious condition.

MR. GLASGOW: The doctor said he had a very high temperature. I asked him if he had pneumonia. He said no, it had not developed into pneu-

monia yet. I talked to Mr. Weber's daughter, and she said that her father was very sick. So did the doctor say he was very sick, but the doctor hoped, unless there was some change toward pneumonia, that he would be out in two or three days.

THE COURT: Would you like to have a day set later this week?

MR. GLASGOW: I wondered if your Honor could fix next Tuesday morning. That would suit me. That would give ample time. I would not want to bring the jury back again and find him in that condition.

THE COURT: You would not want to bring the jury back on election day.

MR. GLASGOW: Well, the day after election day. There is only one day I have anything that would interfere, and that would be next Monday. Any other day would do.

THE COURT: Will you be able to get through in one day?

MR. GLASGOW: I think so, sir.

MR. GOWEN: If Mr. Weber is the only witness, there is no reason why we should not get through in one day.

MR. GLASGOW: One day. That is sure. I regret, of course, to bring the jury back.

THE COURT (to the jury): Are any of you gentlemen election officers—officers of election boards?

(There was no response.)

THE COURT: There appear to be none. Then I will set it for Wednesday, November 5. Gentlemen, I will not promise that I will make any change in that to accommodate the jurors, but if there are any jurors who have any very strong reason why that day would not suit them, I would be glad to hear from them now.

A JUROR: That is the day after election, I understand.

THE COURT: Yes. If that day would suit as well as any other day, we will sit that day. The case will be adjourned till Wednesday, November 5. That will be Wednesday of next week.

(Case adjourned until Wednesday, November 5, 1919, at 10 o'clock A. M.)

Philadelphia, Pa., Monday, November 24, 1919, 10 o'clock A. M.

Present: Parties as before noted.

ISAAC C. WEBER, heretofore sworn, recalled.

MR. GLASGOW: Mr. Weber was on the stand when court adjourned the last time.

By MR. GLASGOW:

Q. Mr. Weber, on the day that you were on the stand when the case was postponed I asked you these questions, to which you gave the following answers: "Q. And your firm, as I understand it, W. F. Jacoby & Company, took over the Falcon No. 2 mine in the Tyrone division on April 1, 1904, and thereafter operated the same?" Your answer was "Yes, sir." "Q. And how long did they operate it? A. One year and six months. Q. To what date? A. October 18, 1905. Q. And did you remain a member of the firm during that time? A. I was not a member of the firm after April 1, 1905." Please tell the jury what you meant by that?

A. I meant I had withdrawn actively, but I retained my financial interest until the mine was sold.

Q. You did, then, have your financial interest in

the partnership up to the time of the sale, but you withdrew from active operation of the mine?

A. Yes, sir.

Q. For the period beginning April 1, 1904, and ending the thirty-first of March, 1905, how many days did the mine actually operate?

A. Two hundred and seventy-five days, I think.

Q. Two hundred and seventy-five days, and what was the rated capacity of that mine to produce coal, which capacity was made by the Pennsylvania Railroad Company?

A. Four hundred and fifty tons per day.

Q. Have you prepared or have you calculated out what amount of coal the mine would have produced from April 1, 1904, to March 31, 1905, if it had cars to have shipped 450 tons a day, its capacity?

A. I have, yes.

Q. How many tons?

A. 123,750 tons.

Q. And how many tons did the mine ship during that period?

A. 38,714 tons.

Q. And what is the difference between the amount that it did ship and the amount it would have shipped if the mine had gotten cars for the 450 tons a day, its capacity?

A. 85,036 tons.

Q. Was there any reason why that tonnage should not have been shipped except for the lack of cars?

A. That is the only reason, I think.

Q. The 85,036 tons, if they had been shipped, and at the profit to you which the Commission finds was the average profit during that period of 29.2 cents, what amount of profit would you have made on the 85,036 tons?

A. $24,830.51.

Q. And the Commission finds that upon the tonnage which you did ship, 38,714 tons, your cost per ton was increased by reason of the lack of cars to ship the capacity of the mine by 9.6 cents excess cost. Now, the 37,714 tons which you did ship, at 9.6 cents increased cost by reason of your not getting the cars to ship that capacity, what did that amount to?

A. That amounted to $3,716.54.

Q. That was during the period that I have mentioned from April 1, 1904, to April 1, 1905?

A. Yes.

Q. What is the total of your damage as shown there if you had your full capacity?

A. A total of $28,547.05.

Q. For the second period from April 1, 1905, to October 18, 1905, how many days was the mine operated actually?

A. You mean from April 1, 1905, don't you?

Q. Yes, to October 1.

A. One hundred thirty-eight and one-quarter days.

Q. And at the rated capacity of the mine of 450 tons a day, if you had gotten the cars for the shipment of your capacity, how many tons would you have shipped?

A. 61,212 tons.

Q. And during the period how much did you actually ship?

A. 17,973 tons.

Q. And the amount of the difference between that which you actually shipped, and that which you would have shipped if you had gotten your full capacity, was how much?

A. 43,239 tons.

Q. At the amount that was found during that period as an average profit by the Commission which you would have received on the coal if you could have

shipped it of 24.7, how much would the 43,239 tons amount to at 24.7 cents profit?

A. $10,680.03.

Q. And during that time you shipped, as you have said, 17,973 tons?

A. Yes.

Q. And the Commission finds that the excess cost of that due to your not getting the capacity or your fair amount of cars was 12.9 cents per ton, and how much does that excess cost amount to?

A. That amounts to $2318.51.

Q. And for the second period the total to you was how much?

A. $12,998.54.

Q. For the two periods if you had gotten the capacity of your mine in cars, how much would have been the profit and the saving of expense to you as a total for the two periods?

A. $41,554.59.

Q. And the Commission awarded you in damages how much?

A. $21,094.49.

Q. And the interest you claim from the twenty-eighth day of June, 1907, just as found by the Commission?

A. Yes.

Q. And the interest you claim from the same date as found by the Commission for interest from the twenty-eighth day of June, 1907. Is that right?

A. Yes.

Q. As I understand it, the exhibit which appears in the Commission's Record, Exhibit No. 10, you aided in making up?

A. Yes.

Q. For the two periods?

A. Yes, sir.

Q. And that was based, as I understand it, on 308 days of car distribution?

A. I think it was.

Q. Why did you take 308 days in making that up?

A. Because the tariff sheets of the Pennsylvania Railroad Company——

Q. You do not mean the tariff sheets. You mean the car distribution sheets?

A. The car distribution sheets of the Pennsylvania Railroad Company show the distribution for that many days in the Tyrone division.

Q. And how many mines were there in that list?

A. I think there were 18.

Q. And what proportion of the entire shipments from the Tyrone division are made up of those 18 mines?

A. 66 per cent. of the output.

Q. 66 per cent. of the output?

A. Yes, sir.

Q. And the car distribution that they got as an average for the 308 days amounted to what per cent. of their capacity for the first period?

A. 59.6 per cent.

Q. 59.6 per cent?

A. Fifty-nine and a fraction. That is right. 59.6 per cent.

Q. And the second period amounted to what?

A. 59.9 for the second period.

Q. Now the second period was 59.6 and the first period was 59.9 per cent?

A. Yes, that is right.

Q. The first period was 59.9 and the second period was 59.6?

A. Yes.

Q. During the second period how many days of

car distribution did you take from April 1 to October 18?

A. 167 days.

Q. Why did you take that?

A. For the same reason; because of the number of distribution days that the sheets cover?

Q. As shown by their distribution sheets?

A. Yes, sir.

Q. What was that statement made up to show?

A. That was made up to show the comparative discrimination.

Q. Discrimination?

A. In favor of certain mines against the Falcon.

Q. And it was made up, as I understand it, upon the basis of the distribution sheets of the Pennsylvania Railroad Company?

A. Yes, sir.

Q. And was introduced for the purpose only of showing the discrimination as against the Falcon No. 2 mine?

A. Yes, sir.

Q. During the first period from April 1, 1904, to April 1, 1905, 308 days, how many cars did it require to ship the 66 per cent. of coal which was the output of those 18 mines?

A. 35,708 cars.

Q. And it required 35,708 for that year to ship the 66 per cent. of the output of that region?

A. Yes, sir.

Q. Dividing that 35,708 by 308 days, how many cars per day on the average were assigned to those 18 mines?

A. About 116 cars per day.

Q. 116 cars it took to ship, then, 66 per cent.?

A. Yes, sir.

Q. Of the output of that region?

A. Yes, sir.

Q. For the second period how many cars were used or assigned to the 18 mines for the shipment of 66 per cent. of the output?

A. 16,032 cars.

Q. And that was for 167 days, was it?

A. Yes, sir.

Q. And how many cars per day were there on the average assigned?

A. 96 cars per day.

Q. How many?

A. 96 cars per day.

Q. And the 96 cars per day were assigned to the Tyrone division, those 18 mines, in order to enable them to ship 66 per cent. of the output of the Tyrone division?

A. Yes, sir.

Cross-Examination.

By Mr. Gowen:

Q. Mr. Weber, for the purpose of preparing the statement which Mr. Glasgow has referred to, which was before the Commission, Exhibit No. 10, you were given access to the car distribution sheets of the Pennsylvania Railroad Company, were you not?

A. I was, yes, sir.

Q. And you made that statement up from those sheets?

A. Yes, sir.

Q. Now, that statement shows that in the first period, namely, from April 1, 1904, to April 1, 1905, those mines which are embraced in that statement received cars equal to 59.9 per cent. of the aggregate rating of their mines, does it not?

A. Yes, sir.

Q. And in the second period the mines which you

had selected for the purpose of comparison, and which are shown in that exhibit, received cars equal to 59.6 per cent. of their rating?

A. That is right.

Q. Now, the Commission found that in the first period your mine could have been worked 275 days, did it not?

A. I think that is correct.

Q. And that a fair rating for your mine was 450 tons per day?

A. Yes, sir.

Q. Which was the rating which the railroad company had given you?

A. Yes, sir.

Q. If your mine had shipped in the first period 59.9 per cent. of the aggregate rating as determined by the 275 days and the 450 tons per day rating, what would its shipments have been?

A. Our statement does not show that. It only shows the actual shipments made and the cars received.

Q. Let me ask you this. The Commission found, did it not, that your mine should have received cars in the first period which would have enabled it to ship——

A. This statement only shows the actual shipments made as taken from the car-distribution sheets.

Mr. Glasgow: This statement shows only the actual shipments made as taken from the car-distribution sheets.

The Witness: On Exhibit No. 10 for the first period.

By Mr. Gowen:

Q. Have you made any calculation to show what percentage of your ratings your mine would have shipped in the first period had it received cars equal to 59.9 per cent. of its aggregate rating for the 275

days which the Commission found the mine could have been worked?

A. No, sir.

Q. You have not made that calculation?

A. No, sir.

MR. GOWEN: We doubtless can agree about that. It is a mathematical calculation.

MR. GLASGOW: There will be no trouble about that. It is a mathematical calculation. It is a question of mathematics.

By MR. GOWEN:

Q. In preparing that statement, Mr. Weber, you say that you selected the mines which you embraced in it for the purpose of showing that they had received a preference as against your mine. Is that true?

A. Yes, sir.

Q. The distribution sheets of the Pennsylvania Railroad Company show the character of the cars which it placed at all the mines, do they not?

A. Yes, sir.

Q. That is, they showed individual cars, fuel cars, and cars other than individual and fuel?

A. Yes, sir.

Q. In preparing that statement, and in showing the number of cars which had been placed at the mines which you selected for the purpose of comparison, you showed all the cars which those mines had received, whether they were individual, fuel or other cars?

A. We treated a car as a car; yes, sir.

Q. That is, you included all cars?

A. Yes, sir.

Q. Individual, fuel and other cars?

A. Yes, sir. This is actual.

Q. With respect to one shipper, you did show the number of individual cars that that shipper received

and the number of cars other than individual cars, did you not?

A. That is not in Exhibit No. 10.

Q. But in connection with another exhibit which you prepared, didn't you show that?

A. In another exhibit, yes, which I think was Exhibit No. 11. I am not quite sure. I think it was.

MR. GLASGOW: That is shown on Exhibit No. 11 as to the Berwind-White Company.

MR. GOWEN: That is what I say. That is what I am getting at.

MR. GLASGOW: That is the Berwind-White Company, yes.

By MR. GOWEN:

Q. Referring to the statement which showed the character of the cars which were placed to the Berwind-White coal mine, that being one of the shippers which you had selected to make the comparison——

A. Yes, sir.

Q. ——what does that show as to the character of the cars? In the first place, how many cars were placed in the first period at the Berwind-White mine?

A. Thirteen thousand four hundred and fifty-two.

Q. How many of those were the individual cars of the Berwind-White Company?

A. Eleven thousand two hundred and eighteen.

Q. How many were fuel cars?

A. One thousand seven hundred and seventy-four.

Q. How many cars other than individual and fuel cars were placed?

A. Four hundred and sixty.

Q. Does that statement show the aggregate ratings of the Berwind-White Company's mine?

A. Yes, sir; it does.

Q. What was the aggregate rating?

A. There are different Berwind mines. There

are seven Berwind-White mines taken here and the ratings vary.

Q. You do not show the aggregate?

A. It does not show the average, but the Eureka mine——

Q. If it does not show the aggregate never mind.

A. It shows it, but it shows it on each individual mine. Eureka No. 5, 250 tons per day.

Q. Does not your Exhibit No. 10 show the aggregate of the rating to the Berwind mine? I think you consolidated them all.

MR. GLASGOW: I do not think it shows on Exhibit No. 10.

A. It does not show the rating; no, sir. Exhibit No. 11 shows the rating. Exhibit No. 11 shows the rating of all the Berwind mines.

MR. GLASGOW: Exhibit No. 10 shows the rated capacity.

By MR. GOWEN:

Q. If you will refer to the first column on Exhibit No. 10——

By MR. GLASGOW:

Q. Exhibit No. 10 shows the rated capacity of 308 days in cars, does it not, the first column?

A. Yes, it does.

Q. It shows the total rated capacity in cars for each period?

A. Yes.

By MR. GOWEN:

Q. Mr. Weber, what was the aggregate rated capacity of the Berwind Company's mines for this first period from April 1, 1904, to April 1, 1905?

By MR. GLASGOW:

Q. Look at Exhibit No. 10 in the first column and see if it is not on it, the rated capacity based on 308 days, 32 tons per car.

A. That is taken as a lump there.

Q. No, 24,260. Isn't that for the first period?

A. Oh, yes. That is right; 24,260 cars, yes.

By Mr. Gowen:

Q. That is the aggregate rated capacity for the 308 days?

A. Yes, sir.

Q. Which you embraced in that exhibit?

A. Yes, sir.

Q. Then am I correct that with an aggregate rated capacity of 24,260 cars the Berwind mine received in the first year from April 1, 1904, to April 1, 1905, only 360 cars other than fuel and individual cars?

Mr. Glasgow: I don't know whether they did or not.

By Mr. Gowen:

Q. Don't you see 360 there? (Indicating.)

A. That is right.

By Mr. Glasgow:

Q. How many did they receive? What others did they receive?

A. They received a total of 13,452 cars, which the distribution sheets showed merely as commercial coal, 460 cars.

Q. Four hundred and sixty commercial cars?

A. Commercial cars.

Q. The sheets showing all the rest being either individual or fuel cars?

A. Yes, sir.

By Mr. Gowen:

Q. Now, take the second period, and refer to the exhibit which shows the number or the character of cars which were placed at the Berwind mines, will you please tell us the total number of cars of all kinds as shown by the sheet?

A. Seven thousand one hundred and fifty-four.

Q. Seven thousand one hundred and fifty-four?

A. Yes.

Q. How many of those were individual cars?

A. Six thousand two hundred and fifty-one.

Q. How many fuel cars?

A. Eight hundred and forty-three.

Q. And how many cars other than individual or fuel?

A. Sixty.

Q. That covered the period from April 1, 1905, to October 1, 1905?

A. Yes, sir.

Q. Coming, then to Exhibit No. 11. I think it is Exhibit No. 10 which shows the aggregate ratings of the mines. Will you please tell us what in that period the aggregate ratings of the Berwind mines were based upon 167 days?

MR. GLASGOW: That is in Exhibit No. 10, the second period, the first column, the last figure.

A. Eleven thousand four hundred and eighty-one cars.

By MR. GOWEN:

Q. I think you have stated, or I think it is a fact, rather—if not, you will correct me—that in making up these exhibits from the distribution sheets you showed only the character of cars with respect to those placed at the Berwind mines, and that as to all other mines you do not show how many were individual and how many were fuel, or how many were other cars?

A. No, sir.

Q. That is all as to that. How did you come to select 308 days for the purpose of making up your Exhibit No. 10 for the first period?

A. We could not do otherwise because the distribution sheets showed distribution for that many days.

Q. That is, the distribution sheets show that on 308 days distribution had been made at the mines of the Tyrone region?

A. Yes, sir.

Q. They did not show distribution had been made on 308 days at other mines in the region?

A. This did not cover the entire mines of the Tyrone division.

Q. I understand that, but you do not mean to say that those sheets show that every mine in that region had received cars on 308 days?

A. The distribution was made from that many days, yes.

By Mr. Glasgow:

Q. You do not understand the question. There were days that you did not get any cars at all?

A. He is asking me whether there was not a distribution made in the division.

Q. No. He is asking you whether every mine in that Tyrone division got cars on every of the 308 days?

A. No, sir. Certainly not.

By Mr. Gowen:

Q. The distribution sheets show that on 308 days the Pennsylvania Railroad Company had made distribution of cars in the Tyrone division?

A. Yes, sir.

Q. That is what they show?

A. Yes, sir.

Q. As to the number of mines, they did not show that every mine in the region got cars on 308 days?

A. No, they did not. Certainly not.

By Mr. Glasgow:

Q. As a matter of fact, your mine frequently did not get cars at all. Isn't that so?

A. We were two weeks without any cars, straight stretches.

By Mr. Gowen:

Q. With reference to what Mr. Glasgow asked you about your relation to Mr. Jacoby, I did not quite understand that. You testified before that your partnership with Mr. Jacoby came to an end on April 1, 1905?

A. If I did I misunderstood his question because that is not true. If I did I misunderstood his question, because that is not true, I say.

Q. What relation had you to the firm of Jacoby & Company after April 1, 1905?

A. I had retained my financial interest until the mine was sold.

Q. Do you mean you drew or received any profits?

Mr. Glasgow: He did not have any. They operated under the Pennsylvania distribution of cars.

By Mr. Gowen:

Q. Answer my question.

A. Let me explain.

Q. I would like you to.

A. I withdrew as an active partner. I did not devote my time to the business after 1905, April 1, but I retained my financial interest since, simply because I could not do otherwise. Mr. Jacoby could not reimburse me for the money I advanced to buy the mine.

Q. What had you contributed to the firm?

A. I contributed $12,000.

Q. That is, when the firm started?

A. Yes.

Q. Was all of that $12,000 in the business when you withdrew?

A. No, sir.

Q. How much remained?

A. The greater portion of it was there.

Q. How much of it?

A. Over $7000.

Q. When did you get the $7000 repaid to you?

A. After the mine was sold.

Q. And had you any partnership articles of agreement?

A. I think so; yes.

Q. Was there any change made in that agreement?

A. No, sir.

Q. After April 1, 1905?

A. No, sir.

Q. Do you regard yourself as responsible, then, because of the relation that continued after April 1, 1905, for any judgments against the firm of Jacoby & Company?

MR. GLASGOW: This is not the place to ask a man if he is liable for any claim of any kind. I suppose that would come up if anybody ever made any claim. I do not think that is a fair question.

MR. GOWEN: I will put it this way.

By MR. GOWEN:

Q. Did you enter into any agreement with Mr. Jacoby effective as of April 1, 1905, which relieved you from any responsibility for the firm operations subsequently incurred?

MR. GLASGOW: I object to that because as between Mr. Jacoby and Mr. Weber I do not know that there is any such agreement, but if Mr. Jacoby and Mr. Weber had a mutual agreement between themselves, it could not affect any creditors of the concern. Not at all.

THE COURT: The question on cross-examination is to find out whether he has any interest as a partner. I think counsel for the defendant is entitled to cross-examine the witness to disclose

what his relations with Mr. Jacoby were. It becomes a question of law, then, as to whether or not he is entitled to continue as a partner. I think that is the point that is in controversy, is it?

MR. GLASGOW: Undoubtedly.

THE COURT: I will overrule the objection and grant the plaintiff an exception.

MR. GLASGOW: I withdraw the objection.

(Question read.)

A. I did not.

RE-DIRECT EXAMINATION.

By MR. GLASGOW:

Q. In Exhibit No. 10, to which Mr. Gowen has referred, and which you say was made up simply to show the discrimination as against the Falcon No. 2 mine, your mine, during the first period it showed, as I understand it, that the mines with which you compared your mine, being Electric, Lenore, Peerless, No. 1, No. 2 and No. 3 Berwind-White, seven mines, Lehigh Valley Coal Company—it shows that they got during the first period 59.9 of their entire rated capacity in cars?

A. It does; yes, sir.

Q. During that period what per cent. of its rated capacity did your mine get?

A. Twenty-eight per cent., I think.

Q. You know it is. It is right there before you.

A. The first period?

Q. The first period.

A. Twenty-eight per cent., the first period.

Q. Twenty-eight per cent., and there were mines—take Standard No. 7. It got 88.9 per cent. of its capacity, did it not?

A. Yes, sir.

Q. During the second period those mines that they

compared it with got 59.6 per cent. of their entire rated capacity in cars, did they not?

A. Yes, sir.

Q. What did your mine get?

A. 23.9 per cent.

Q. Standard No. 7 got 76.8 per cent.?

A. 76.8 per cent.

Q. Mr. Gowen has talked about fuel cars and individual cars. When he speaks of individual cars, or the kind of cars that are owned by the Berwind-White Company, and which are in the service of carrying coal from the mines to the market——

MR. GOWEN: I do not mean that. I mean the individual cars which are owned by all the shippers, including those owned by the Berwind-White Company.

MR. GLASGOW: I am talking about it so far as the Berwind-White Company is concerned. I am defining what an individual car is.

MR. GOWEN: You are defining it as a car which belonged to the Berwind-White Company. That is not a correct definition. That is not my definition.

By MR. GLASGOW:

Q. I will say "cars" because, as I understand it, the Berwind-White Company is the only people whose individual cars were shown on that Exhibit No. 11 statement. That is the reason I took them. An individual car is a car owned by the mine as illustrated by the cars of the Berwind-White Company, and which are engaged in the carrying of coal from those mines to the market?

A. Yes, sir.

Q. And the Commission considered the individual cars of the Berwind-White Company, and so forth, in

this proceeding, and treated all cars as a car in the distribution, did they not?

A. They did.

Mr. Gowen: That is a matter of record which you can show.

By Mr. Glasgow:

Q. Then a fuel car which Mr. Gowen talked about means that if the Reading Railway wants fuel on the Pennsylvania Railroad, or the Pennsylvania Railroad wants fuel for its own purposes, it sends cars up there to the mine, and they are shipped in those cars to the carrier company?

A. Yes, sir.

Q. And those cars were not counted in the distribution as against the mine receiving them, were they?

A. They were not.

Q. Neither were individual cars, were they?

A. They were not.

Q. And after you took out the individual cars that those mines were using, these sixteen mines, or whatever they were, and the fuel cars of shipments to the Pennsylvania and fuel cars of shipments to other roads, there was very little left for distribution in that territory?

A. There certainly was.

Q. And the Commission held that that was not right, did it not?

A. I believe so.

Mr. Glasgow: That is our case for the plaintiff.

Mr. Gowen: I suppose it is understood that the three exhibits from which Mr. Weber has testified are to be regarded as in evidence?

MR. GLASGOW: I understand that all of the exhibits which were offered with the report of the Commission, and a part of this record, are in evidence.

MR. GOWEN: All of the exhibits which are in the record of the Commission. I think the whole thing is offered in evidence.

MR. GLASGOW: Yes. They are. I said to Mr. Phillips not to copy them until you and I directed him which ones to copy.

MR. GOWEN: I did not want to have any misunderstanding that the exhibits are in evidence.

MR. GLASGOW: All the exhibits which are with the Commission's records, a copy of which we have here, and which by agreement of counsel we will use, are in evidence.

(Plaintiff rests.)

DEFENDANT'S EVIDENCE.

MR. GOWEN: At a former trial of this case a witness was called to testify as to certain mathematical calculations which he had made, and it has been agreed by Mr. Glasgow that his testimony on that subject shall be read here with the same effect as if the witness had been recalled and testified. The testimony reads as follows:

"SIDNEY J. SANDERS, having been duly sworn, was examined as follows:

By MR. GOWEN:

Q. Referring to the order which has been put in evidence made by the Interstate Commerce Commission, finding a certain amount as due Jacoby & Company, will you please say whether you have taken the daily rating fixed by the Commission as proper, namely, 450 tons per day, and multiply that by 275 days, the days which the Commission

found the plaintiff's mine would have been able to work in the year ending March 31, 1905, and tell us what the aggregate number of tons is, based upon those two figures?

A. 123,750 tons.

Q. In that same order the Commission has found that the plaintiff shipped in that period 38,714.23 tons, and that they ought to have received cars which would have enabled them to ship 35,412.02 tons additional. If they had made those additional shipments what would the total volume of shipments have been?

A. 74,125.25 tons.

Q. What percentage of the aggregate capacity of the mine, based upon 450 tons per day and 275 days, are the aggregate shipments which would have been made, which you have just spoken of?

A. 59.59 per cent.

Q. Coming to the second period of the action, the Commission found that 450 tons per day was a proper rating for the mine, and that the mine would have been capable of working 138¼ days. What, on that basis, is the aggregate capacity of the mine in that period?

A. 62,212.51 tons.

Q. In their order the Commission found that in that period the mine had shipped 17,973.88 tons and that it should have received cars which would have enabled it to ship 19,104.77 tons additional. If it had made those additional shipments, what would have been the total shipments in that period?

A. 37,078.65 tons.

Q. And what percentage is that of the aggregate rated capacity based on 450 tons a day and 138¼ days?

A. 59.6.

CROSS-EXAMINATION.

By MR. GLASGOW:

Q. Will you go just a little further and tell us, if you have worked it out, the same way as the other mines on the same division, what would have been their shipments?

A. I have not the answer for that.

Q. Of course not, and therefore your calculation of those mere figures is not worth anything on the proposition of discrimination as between this mine and others, is it?

MR. GOWEN: That is a matter of argument.

Q. If the question is one of discrimination, your figures there would not be of any value unless you knew what the other fellow was getting, would they?

MR. GOWEN: That is a question of argument. The witness cannot answer legal questions.

A. I cannot answer that."

MR. GOWEN: It is also agreed, if the Court please, that we could read into the record and read to the jury two statements which were prepared showing the number of cars placed in the Tyrone region during the period of the action of all sorts, and also the region ratings of the mines in that district or in that region. I do not know that it would be of any advantage to the jury that I should read this month by month, because it would be impossible for anyone to carry these figures in their heads, and with Mr. Glasgow's permission I will read, therefore, the totals.

MR. GLASGOW: Go ahead. I will agree to most anything.

MR. GOWEN: The Tyrone region, including the Snow Shoe region, April, 1904, to March, 1905, inclusive. Region rating in cars, including Snow Shoe region. Total region rating in cars, 255,617. Total cars placed, 77,430.

April, 1905, to October, 1905, inclusive, total region rating in cars, 166,434. Total cars placed, 49,834.

It is agreed that in the first period, that is, from April, 1904, to March, 1905, the cars placed amounted to 30.3 per cent. of the region rating;

that in the second period the cars placed amounted to 29.9 per cent. of the aggregate region rating in cars for that period.

Mr. Gowen: I want also to read an extract of the proceedings before the Commission, which have been offered in evidence. It is an extract from the testimony of Mr. Trump, one of the officers of the Pennsylvania Railroad Company, found at page 188 (Interstate Commerce Record). This testimony is as follows:

"Mr. Gowen: Now, Mr. Trump, I wish you would just state what the examination developed as to the physical capacity of the mines tributary to the Pennsylvania Railroad—what tonnage were those mines capable of shipping, according to your examination?

Mr. Trump: 34 per cent. That is our shipments for the year.

Mr. Gowen: No, no; what was the physical capacity of the total—the aggregate physical capacity of the mines to ship, as developed by the examination?

Mr. Trump: 9760 cars per day—of 25 tons.

Mr. Gowen: What had been the average daily shipments of all the mines for the year preceding May 1, 1906?

Mr. Trump: 3317 cars of the same capacity.

Mr. Gowen: So that the physical capacity exceeded the actual shipments to the extent of almost three times?

Mr. Trump: Yes, sir."

Samuel Porcher, having been duly sworn, was examined and testified as follows:

By Mr. Gowen:

Q. What position with the Pennsylvania Railroad Company did you hold in the year 1902?

A. I was assistant purchasing agent of the Pennsylvania Railroad Company.

Q. You are now purchasing agent?

A. Yes.

Q. Although you have been drafted by the Railroad Administration?

A. Yes.

Q. Have you any familiarity or knowledge of the transactions involving the sale of 1000 coal cars to the Berwind-White Coal Mining Company and of 500 cars to the Keystone Coal & Coke Company?

A. Yes, sir.

Q. Will you please state what you know of that transaction. In the first place, when did that transaction take place—those sales?

A. It took place in 1902.

Q. In the year 1902?

A. The year 1902.

Q. What did the transactions involve?

A. The transactions involved the sale of certain coal cars, the hopper coal cars to the Berwind-White Coal Mining Company and to the Keystone Coal & Coke Company, and the replacement of them by the purchase on the part of the Pennsylvania Railroad Company of the same number of cars to take their places.

Q. Were the sales of cars completed cars, or of cars under construction? Do you recall that?

A. They were the sales of both. They were partly completed, in the case of the Berwind-White Coal Mining Company, and partly cars under construction, I think, in the case of the Keystone Coal Mining Company, cars under construction, if my recollection is right, or about to be constructed.

Q. When were the replacement orders which you speak of given?

A. I would like to refer to my record here. With regard to the 1000 for the Berwind-White Coal Mining Company, the order for replacement was given by the Pennsylvania Railroad Company on the 18th day of July, 1902.

Q. Can you give us about the date when all the cars under that replacement order—when the completion of deliveries of cars under that replacement order took place?

A. All of the cars on that order were completed and delivered to the railroad company by the twenty-fourth of November, 1902.

Q. The twenty-fourth of November, 1902?

A. Yes, sir.

Q. How as to the replacement order for the cars sold to the Keystone Coal & Coke Company?

A. That was for the number of 500 cars, and that order, the replacement order for that number of cars was made on September 29, 1902.

Q. About what time were the cars all delivered?

A. I am looking to see, sir. Those cars were replaced between November 26, 1902, and December 8, 1902, according to my records here.

Q. That is, the replacement order was completely filled by deliveries of cars by December 8, 1902?

A. According to my record, yes, sir.

Q. Are you familiar also with the sale of cars to the Ellsworth Company?

A. I am not very familiar with that. I had to do with the purchase of cars for the Eastern End of the Pennsylvania Railroad Company, and those Ellsworth cars were probably for the lines west, and while I had some knowledge of the circumstances, I had, as I recollect, nothing to do with the transaction itself.

Q. You do know, do you, that those cars were not intended for the Pennsylvania Railroad Company, but

whatever sale was made, was made of cars which were intended to be used on the Pennsylvania Lines west of Pittsburgh?

A. Yes, sir.

CROSS-EXAMINATION.

By MR. GLASGOW:

Q. When was the anthracite strike—the great anthracite strike in Pennsylvania?

A. Mr. Glasgow, I don't know when it was.

Q. 1902?

A. 1902; yes, sir. Very well, sir.

Q. There was a tremendous storage of fuel at that time, was there not, and following it?

A. If you say so; yes, sir.

Q. I would say so if it was proper for me to do so. And in the midst of that period, that time, the Pennsylvania Railroad Company sold 1000 of its cars to one of the shippers on its own line, did it not?

MR. GOWEN: Not in the midst of the strike.

MR. GLASGOW: In the period of a shortage of coal.

By MR. GLASGOW:

Q. That is the fact, is it not?

A. Yes, sir, it sold these cars to the Berwind-White Company.

Q. And it thereby deprived itself of the ability to the extent of 1000 cars to serve anybody on its line except the Berwind-White Company. Is that correct?

A. No, sir.

Q. To the extent of 1000 cars?

A. No, sir, I should not say so.

Q. Why would you not say so?

A. Because, Mr. Glasgow, there were cars coming out of the car works for the railroad company in large numbers at that time. The car works were turning out

cars as fast as they could, and turning them out in large numbers, and from the figures that I have given here, and others that I can give, I think you would see that any diversion of cars from the product of the car works to the Berwind-White people was short and the diversion of the Pennsylvania Railroad running equipment to the Berwind-White Coal Mining Company did not amount to 1000 cars.

Q. At that period everybody who wanted to ship coal was short of cars, were they not? There was not anybody getting cars to run their capacity?

A. If there was not 100 per cent. distribution I suppose they would be short.

Q. You know that, as a matter of fact?

A. I believe so, yes, sir.

Q. And, as a matter of fact, during that period of shortage of cars the Pennsylvania Railroad took out of its equipment, or out of the cars that were immediately being delivered to it, 1000 cars and turned them over to the Berwind-White Company?

A. Not 1000, sir. Part of 1000. Not out of the Pennsylvania Railroad running equipment.

Q. I say, out of these cars and other cars that were then pending to be delivered to them, they took 1000?

A. Yes, sir.

Q. And then you say, to remedy that, the Pennsylvania Railroad got additional cars to the amount of 1000?

A. Yes.

Q. If it wanted to serve all of its patrons ratably, and had kept the 1000 it let the Berwind-Company have, and had gotten the other 1000 that it demonstrates it could have gotten, it would have had 2000 cars to distribute among them, would it not?

A. No, sir, it got all the cars, the coal carrying

trade got all the cars it was possible for the car companies to deliver.

Q. Exactly, but the Berwind Company got 1000 certainly, and that left 1000 for distribution elsewhere?

A. The Pennsylvania Railroad placed a replacement order before the Berwind people got the 1000 cars.

Q. Yes, of course, they did; but what I am talking about is this: The Berwind Company got 1000 cars. That is certain, is it not?

A. Yes.

Q. And then, afterwards, when the Pennsylvania Railroad Company got the 1000 cars by orders for replacing the 1000, when they came to the distribution of those cars, Berwind also got his proportion of those 1000, did he not?

A. I don't know.

Q. That is the system that was in effect, was it not?

A. Yes, sir.

Q. So that he got 1000 certainly, arbitrarily, and then he got his proportion of what was coming afterwards in the form of 1000 cars additional?

A. Mr. Glasgow, could not the Berwind people have gotten the 1000 cars anyhow? Cannot the Berwind people buy 1000 cars from the car builders at any time, and isn't it only such cars that really went out of the service of the Pennsylvania Railroad Company which come into the consideration?

Q. That is all right except if he had gone to Chicago and bought 1000 cars and put them on the Pennsylvania Railroad for service, it would have added to the power of the Pennsylvania Railroad to increase its service for coal, but when the Pennsylvania Railroad takes 1000 of its own cars and turns them over to Mr. Berwind to be used in his coal trade, what is going to become of the other shippers on the Pennsylvania Railroad that also want to ship coal?

A. Mr. Glasgow, I am not a good enough lawyer to argue with you, but don't you recollect, sir, on a previous occasion when we were talking about this thing, that if you can put cars in service, so as to get the best use of them in efficiency, probably that is the best thing for you to do? I mean if you can run cars backwards and forwards in quick business maybe that relieves transportation conditions in such a way that in the long run—this is my own opinion now, of course—you get better results than by any other way?

Q. Then a very pertinent question comes up on the theory you have advanced: Why didn't the Pennsylvania Railroad let the Berwind Company have all of their cars because the Berwind Company only got 50 per cent. of its capacity of its mine with the 1000 cars? Why not give the Berwind Company all of the cars?

A. I would like to say that maybe it would be a good plan if everybody had private cars.

Q. Why, certainly, it is better for those that have them as against those that have not, is it not?

A. Yes, I suppose so.

Q. The Commission held on that proposition this, and I want to know if this meets with your view.

MR. GOWEN: I object to this question.

By MR. GLASGOW:

Q. "Another point also mentioned in our report in the coal and oil investigation just referred to is that 1000 of the defendant's own system coal cars were sold by the defendant to and were thus made available by the Berwind-White Company. The defendant to that extent diminished its capacity to supply the coal-car requirements of other coal operations upon its lines. While the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will

not be considered in this report, the least that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors." Do you agree with the Interstate Commerce Commission in that statement?

MR. GOWEN: I object to that question.

MR. GLASGOW: I will waive the question if you object to it.

By MR. GLASGOW:

Q. The 500 cars that were sold to the Keystone Coal and Coke Company, were those cars that were taken out of the cars which were then in the process of construction for the Pennsylvania Railroad?

A. I believe they were; yes, sir.

Q. And then afterwards the Pennsylvania Railroad bought 500 more?

A. Yes.

Q. Then, of course, if it had not sold them to the Keystone and had taken the 500 additional, they would have had 1000 to serve the public with?

A. How is that?

Q. If they had not sold those 500 to the Keystone and had procured 500 additional, which they did procure, they would have had 1000?

A. Yes, but they would not have procured 500 additional.

Q. They could, though?

A. They could, but they would not.

Q. Why?

A. Because there is every year a certain program for increase in equipment laid down, and that is dependent upon two things; first the transportation division necessities for cars. They make requests for what they think they ought to have to move the busi-

ness of the railroad company, and in the second place, the amount of money the railroad company can provide for buying such equipment. That limits always the number of cars.

Q. You do not pretend to say that they would not have bought additional cars? People were buying all the cars they could get made then, were they not?

A. Yes, I would say they would not.

Q. They would not?

A. Yes. I would say they would not, because the program for that period was determined upon a definitely laid down program, and these so-called replacement orders were given to fill up this program.

Q. The Ellsworth cars spoken of by Mr. Gowen were 700, were they not?

A. I don't remember.

Q. The cars you spoke of as the Ellsworth cars were 700. That is my recollection; 700 cars. Mr. Hutchinson in the coal and oil investigation spoke of 1000 cars to the Berwind and 500 to the Keystone and 700 to the Ellsworth, making 2200 cars. I am not going to ask you about the details of that transaction, but just if you have any idea as to the number of cars?

A. I cannot say.

RE-DIRECT EXAMINATION.

By MR. GOWEN:

Q. I think your records show, do they not, the dates of deliveries to the Berwind Company of 1000 cars and the dates of receipts by the Pennsylvania Railroad of the 1000 cars which were purchased to replace them?

A. Yes, sir.

Q. Month by month?

A. Yes, sir.

Q. Will you just let the jury have that information?

Mr. Glasgow: What is the use of going over those details? I have no objection.

A. As I said, Mr. Gowen, to Mr. Glasgow just a moment ago, there was not a withdrawal of the entire 1000 cars from the equipment of the Pennsylvania Railroad. As a matter of fact, there were the withdrawal of 727 cars from the Pennsylvania Railroad Company's equipment, and those were turned over to the Berwind-White Company as follows: In August, 1902, two cars were turned over to them on the 8th. One on the 10th. One on the 13th.

By Mr. Gowen:

Q. Just give the aggregate by months.

A. And so on. In August, 1902, there were 124 cars. In September, 362. In October, 105. In November, 61. December, 27. January, 1903, 10. February, 3. March, 1. April, 15. May, 6. June, 7. July, 2. August, 3. November, 1. Making a total of 727. Now, what was your next question, sir?

Q. How were the replacement cars delivered to you month by month?

A. I do not believe I have that here, Mr. Gowen. I can tell you when they were finished, though.

Q. You have given us that.

A. Yes.

Q. Never mind. I thought the record showed that.

A. I have a memorandum here of what length of time the railroad was out of use of those cars.

Q. Never mind.

A. But the total delivery, as I have said, of the replacement cars was finished——

Mr. Glasgow: You have already said that. You need not go into that again.

Mr. Gowen: I have nothing more.

EDWARD B. CHASE, having been duly sworn, was examined and testified as follows:

By MR. GOWEN:

Q. You are connected with the Berwind-White Coal Mining Company?

A. Yes, sir.

Q. And were in the years 1904 and 1905?

A. Yes, sir.

Q. Have you had prepared from your records a statement of the total number of cars delivered by the Pennsylvania Railroad to the Berwind-White Coal Mining Company in the months beginning April, 1904, and ending October, 1905?

A. Yes, sir.

Q. Is this the statement you handed me?

A. Yes, sir.

By MR. GOWEN:

Q. What do you mean by the Scalp Level region?

A. That was a region known on the Pennsylvania Railroad at that time as the Scalp Level division. It was a branch that went in from South Fork.

Q. It has nothing to do with the Tyrone division?

A. No, sir.

Q. A separate region?

A. Yes.

Q. As I understand it, this statement of the cars is on the Scalp Level region?

A. Yes, sir.

By MR. GOWEN:

Q. Does this statement include all the cars delivered, individual, fuel, commercial and other cars?

A. Yes, sir.

MR. GOWEN: I offer this statement in evidence. I will put it in the record.

CROSS-EXAMINATION.

By MR. GOWEN:

Q. What kind of cars are these?

A. One hundred thousand pounds capacity cars known as G. L. A. That is, I cannot tell you what all those cars received were, but general equipment coal cars.

Q. One hundred thousand pounds?

A. All cars are not 100,000 pounds, but they are all known as open-top coal cars, gondola.

Q. That means a 50-ton car?

A. If they were 100,000 pounds; yes, sir.

Q. The standard of Pennsylvania distribution, Mr. Trump said, was 25-ton cars?

A. At that time they were counting a 50,000 car with 25-ton capacity as a basis of a car and a steel car of 100,000 pounds as a basis of two cars.

Q. Under the Pennsylvania Railroad Company's distribution you would be unable to tell from this how many cars they charged you as having received because you do not know which were steel and which were not?

A. We know in making the tonnage, Mr. Glasgow.

Q. You do not know it on this statement?

A. No.

Q. So that while you have, for instance, April, 1904, 235 per day, did you get 235 cars per day in the month of April?

A. We got 235 cars during the month for the region there—235 cars a day; yes, sir.

Q. Yes, but some days you might have got 500 and some you might have got less?

A. No, at no time did we get 500.

Q. Two hundred and thirty-two cars, if they were all steel, would have made, according to the Pennsylvania Railroad's distribution, four hundred and sixty-four; would it not?

A. But that is made up of cars regardless of their capacity. It is just the total tonnage divided into cars of twenty-five tons as they were known then.

Q. That is what I say. The total number of cars here for April you have as 6102?

A. Yes, sir.

Q. You do not pretend to say from this statement how many of those were steel and how many other cars?

A. No, sir; but it would be the equivalent.

Q. You would have an average per day of 235 in the month of April?

A. On a 25-ton basis.

Q. How do you know it was on a 25-ton basis?

A. Because the tonnage here represents that, 6102 cars divided by the cars received equals——

Q. I cannot understand it.

A. If you had shipped a million tons of coal you can change that over into 50-ton cars or 25-ton cars, it makes no difference, that being so mixed up with various sizes of cars, and the total tonnage was taken after dividing it on the basis of 25.

Q. Yes, but how do you get 6102 cars for the month of April?

A. Because the tonnage of that month equaled that many cars.

Q. Yes, but at how much per car?

A. That the tonnage would equal on the basis of 25 if that is the basis of rating at that time.

Q. Which was? That is what I asked you. Which was it? What was the basis of rating?

A. I assume it would be at 25.

Q. I do not want your assumptions. I want to know if you know.

A. I would not say positively at that time, no.

Q. You don't know whether the 6102 represents

the actual car without regard to its capacity, or whether it is based on 6102 cars of any fixed capacity?

A. I have the figures in my office that will show that.

Q. I know, but I am talking about this statement. Do you know whether this shows it?

A. I would know that the tonnage for that month equalled that amount of cars of that capacity.

Q. Of what capacity?

A. On a basis of 25 tons to a car.

Q. You do know that?

A. Yes.

Q. Is not 235 cars per day a mighty small amount for you to be shipping out of that region?

A. Yes, sir.

Q. In 1904 and 1905, prior to that, they had been directed arbitrarily to give you 500 cars a day?

A. They had been directed but they were never received.

Q. You wanted them?

A. We wanted all we could get.

Q. They ordered the people to give them to you?

A. Yes, sir. We never got them, our records show.

Q. You never got them?

A. No, sir.

Q. Then you say for the month of April, 1904, that you did not get even half that amount?

A. No, sir; I mean to say that we did not.

Q. How do you account for that?

A. Well, there was a great demand for coal at that time, as there is a demand for coal now, and the railroads, generally speaking, I presume, tried to build sufficient cars to take care of their average yearly shipments. At times there would be a demand for coal and other times there will be no demand whatever. It is no doubt based upon the desire on the part of the

railroad company to take care of the requirements of shippers as best they can for the 12 months.

Q. Prior to that time you had gotten 100 cars from the Pennsylvania Railroad, had you not?

A. That we purchased from the railroad?

Q. Yes.

A. Yes, sir.

Q. How many more individual cars did you have?

A. I do not recall at that time, but we had a number of small cars at that time.

Q. How many?

A. Less capacity?

Q. How many? What capacity? What do you mean by small capacity?

A. 25 tons.

Q. That was the standard, as I understand you, of the Pennsylvania Railroad at that time?

A. That had been the standard.

Q. In counting distribution?

A. Yes, sir.

Q. So that you had how many more, did you say, about?

A. I should say 1000, perhaps, at that time.

Q. 1000 more?

A. Yes.

Q. Is that all the individual cars you had?

A. I do not recall at the present moment just how many cars we had, but we were increasing our supply of cars as we could purchase them.

Q. Don't you know that you had a great many more individual cars than 2000 in 1904?

A. I think we had increased it by that time, but you speak about 1000 being purchased in 1902. In 1904 we had increased our supply of cars.

Q. How many do you think you had in 1904?

A. I think we had in the neighborhood of 3000 cars.

Q. Did not you have more than that in 1904?

A. I think that is about it.

Q. Did you ever have any more than that?

A. I think now that we perhaps have 3500 cars.

Q. Who made this statement up?

A. It was made under my direction.

Q. Yes, but I asked you who made it up?

A. Mr. Glasgow, that statement was made up some time ago when we were asked to prepare a statement for this case, and I cannot tell at this time just who did the actual typewriting, but it was made under my direction.

Q. You told them to get the amount of tonnage shipped each month and divided it by 25, didn't you?

A. No, I told them to show for the period that was asked for the number of cars we received, and also asked that they show, if I remember correctly, the number of individual cars, as well as system cars. I not knowing this case was coming up today I did not have a recent statement that I had prepared, but I can produce it.

Q. Does it include the individual cars used?

A. Yes.

Q. Does it include fuel cars you used there?

A. Yes, sir; every car.

Q. As I understand you—for instance, take these 6102 cars in April, 1904. As I understand it, the 6102 represents the total tonnage, which you shipped out of Scalp Level divided by 25. Is that right?

A. I think that is the way it was derived; yes, sir.

Q. We want somebody who knows.

A. I told you, I will furnish you that later.

Mr. Glasgow: I must object to this statement unless I can get someone here who knows about it, because from my cross-examination it cannot

amount to anything unless the witness knows who made this out.

THE COURT: Is this a statement of the distribution of cars on some other region than the Tyrone region?

MR. GLASGOW: Yes, sir. The purpose of it has not developed, but the objection to it is that I cannot get from this witness a statement about it because naturally he does not know about it.

THE WITNESS: I want to say that I will have this replaced and have it replaced tomorrow with another statement. This statement, you will notice, was made up some time ago.

MR. GLASGOW: But tomorrow is another day and I want to finish this case today.

MR. GOWEN: This is the last witness I am going to call.

By MR. GOWEN:

Q. I suppose, Mr. Chase, you could ascertain definitely this information in the course of an hour, could you not?

A. I will attempt to; yes, sir.

THE COURT: What Mr. Glasgow wants to know is on what basis the calculation was made, whether on the basis of the number of cars or on the basis of the number of tons. Isn't that it?

MR. GLASGOW: I would like to have somebody who really made up that statement who examined the books.

THE WITNESS: I examined the books.

By MR. GLASGOW:

Q. Will you verify the statement?

A. I can verify the statement.

Q. I am not asking you, can you. Will you?

A. I will.

Q. I will ask you if you will verify this statement from the books?

A. Yes, sir.

Q. Have you already done that?

A. Yes, sir.

Q. Then I do not see why you cannot answer my question.

A. I will tell you, because that was made up a long while ago, and there have been too many things going on, strikes, and troubles, that we have had, to be familiar with a situation that happened back there at this time. When that was made up I could be very prompt on it, but I cannot now, Mr. Glasgow, with the many things that have been happening.

By The Court:

Q. How soon can you verify it?

A. I will try to verify it in an hour. If your Honor will adjourn for luncheon I will try to have it here when you resume.

The Court: Mr. Gowen, have you anything further?

Mr. Gowen: No, sir.

The Court: If the witness can give Mr. Glasgow the information he desires after luncheon that ought to be satisfactory.

Mr. Glasgow: I did not know I was going to be called, and I did not get to my office until after 10 o'clock.

The Court: What Mr. Glasgow, apparently, wants to know is on what basis you calculated the number of cars—the tonnage. That is what I understand he wants, but Mr. Glasgow will have to state it himself. I understand what you want to know with regard to this statement is on what basis the number of cars is calculated from the tonnage.

MR. GLASGOW: Exactly. How do you arrive at that?

THE COURT: The witness says he can supply that to you after recess.

MR. GLASGOW: I am satisfied.

THE COURT: Is that satisfactory?

MR. GLASGOW: Yes.

THE COURT: Is there anything further, Mr. Gowen, this morning?

MR. GOWEN: I think that will complete our case, if your Honor please. There is just one extract from one of the reports of the Commission which I have not been able to lay my hands on.

MR. GLASGOW: You mean it is in one of the reports?

MR. GOWEN: Yes.

MR. GLASGOW: They are both in evidence. Both reports I have already offered in evidence.

SAMUEL PORCHER, heretofore sworn, recalled.

By MR. GOWEN:

Q. I understand that you have found among your records the statement showing the dates upon which the cars which were ordered to replace those sold to the Berwind-White Company were delivered to your company?

A. Yes.

Q. Will you please give us the monthly deliveries of those cars?

A. It escaped me at the time when you asked me before. The delivery was begun on the twenty-fifth day of October, 1902, and during October there were 425 of the 1000 delivered, and the remainder during the first 24 days of November.

Q. Have you any record as to the Keystone cars —a similar record?

A. I think I have; yes, sir. There were 500 of those cars, and they were delivered from the 18th of October, 1902, to the 31st of October, 1902.

(No cross-examination.)

MR. GOWEN: I want to put in evidence a certified copy of a report of the Interstate Commerce Commission rendered in the case of Hillsdale Coal and Coke Company to the Pennsylvania Railroad Company.

MR. GLASGOW: What is the citation?

MR. GOWEN: Reported in 19 I. C. C., the Hillsdale case being one of the cases——

MR. GLASGOW: I object to that. I introduced the two reports that were made in the Jacoby case.

MR. GOWEN: The report starts off in this way: "In this group of cases, of which the above-entitled complaint has been selected as the one in which the views of the Commission may be best expressed, the petitioners bring to our attention," and so on.

(Objection withdrawn.)

(At 1 o'clock P. M. a recess was taken until 2 o'clock P. M.)

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2 o'clock P. M.

Present: Parties as before noted.

MR. GOWEN: I offer in evidence a certified copy of a report of the Interstate Commerce Commission delivered in the case of Hillsdale Coal & Coke Company v. Pennsylvania Railroad Company. I offer this in evidence for the purpose of establishing the rule of distribution which the

Commission determined should have been pursued by the railroad company in the period of the action. I am going to offer this report, which is very lengthy, containing the discussion by the Commission of the legal principles involved, and read the conclusion merely, which is very short.

After condemning the rule which the railroad company has enforced the Commission proceeded this way:

"We further find that the continuance of that system of distribution for the future would be unlawful on the same grounds. Although for the mine owning private cars, to which company or foreign railway fuel cars are consigned is entitled to receive them even though in excess of its ratable proportion of all available coal car equipment, nevertheless the defendant will be required in the future to count all such cars against the distributive share of the mine so receiving them. It is scarcely necessary to add that the complainant's second request for a finding and for an order requiring the defendant, during percentage periods, to distribute ratably among operators, according to the actual output capacity of their mines, 'all cars adapted to and used for carrying bituminous coal,' whether company fuel cars, foreign railway fuel cars, or private cars, must be denied."

EDWARD B. CHASE, heretofore sworn, recalled.

By MR. GLASGOW:

Q. You have a statement there of the cars received by you at Scalp Level?

A. Yes, sir.

Q. Where is Scalp Level?

A. Scalp Level is designated as a region in Somerset County, 12 miles south of Johnstown, on what

was known as the Scalp Level Railroad, now the Pennsylvania Railroad.

Q. Where is South Fork?

A. South Fork is the intersecting point of the Pennsylvania Railroad where the cars branch off to go to the Scalp Level region.

Q. You have mines in the Scalp Level region?

A. Yes, sir.

Q. You have mines also in South Fork?

A. We have none in South Fork proper. Just outside of South Fork we have one.

Q. Just outside of South Fork?

A. Yes.

Q. Which, however, is not in Scalp Level?

A. No, sir.

Q. It is classed as South Fork?

A. No, sir, it is classed as Scalp Level. The distribution of our mine is classed as Scalp Level district.

Q. You have there a statement gotten up which purports to show a statement showing the cars shipped from the Scalp Level region from April, 1904, to November, 1905?

A. Yes, sir.

Q. And that purports to show for each month the total cars?

A. Yes, sir.

Q. Does that also include South Fork?

A. Yes, sir, everything in that region.

Q. And in April, 1904, you appear to have 6102 cars?

A. Yes, sir.

Q. And per day 235 cars?

A. Yes, sir.

Q. Does that 6102 represent actual cars?

A. It represents the shipment of the month of 305,123 tons divided by 50 tons, equivalent to one car.

Q. The 6102, you did not get at that by counting the actual cars that you got?

A. No, sir.

Q. You merely took the number of tons and divided it by 50?

A. Yes, sir. They are all classed as cars, all sizes, so as to get at a fixed divisor, we took the total tons and divided it by 50.

Q. By 50?

A. Yes.

Q. And, therefore, the number of actual cars which you received that month does not appear on this statement?

A. No, sir.

Q. Nor the number of actual cars you received daily on this statement?

A. They are included in the total.

Q. But the actual cars do not appear?

A. No, sir.

Mr. Gowen: We offer this statement in evidence; the statement showing cars shipped from Scalp Level region from April 1, 1904, to November, 1905.

Mr. Glasgow: There are some portions in the same report which Mr. Gowen read from which have a bearing here. I understand Mr. Gowen has offered the whole report?

Mr. Gowen: Yes.

Mr. Glasgow: On page 364 it says this:

"Referring to system fuel cars, and foreign railway fuel cars consigned to a particular mine, the Court in Logan Coal Company v. P. R. R. Co., supra, said:

'The general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated

as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line, upon a basis giving each equal facilities with the other. Following are some of the cases in which these questions have been considered:"

Then it cites the cases.

"That is the general theory for the distribution of coal car equipment that has appealed strongly to this Commission as being fair, reasonable and non-discriminatory. We recognize the right of the company to contract with a particular operator for its fuel supply; we recognize the right of a connecting line also to do this; and each may send its cars to those mines to the exclusion of other mines. We also insist that the owner of private cars is entitled to their exclusive use. But in each case we hold that all such cars must be counted against the distributive share of the mine receiving them."

Then on page 368:

"The defendant meets this point by asserting that the real question to be determined is whether the complainant received less than its proper share of the cars distributed by the carrier during periods of scarcity of equipment, and that it is not material that some other coal operator may have received more than his quota of available cars. In other words, the contention is that so long as the complainant received all the cars it was entitled to it has no right to complain that some other coal shipper, as the result of a high mine rating or otherwise, secured an excessive proportion of the available cars, if this preference was not at the expense of the complainant. We must reject that view. The Act to Regulate Commerce as amended not only gives a shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier, but gives him the assurance also that no one else shall fare ratably better

than he does at the hands of the carrier. It may be true that a Court would not allow the complainant damages for losses due to the defendant's failure to furnish it cars that it was not entitled to receive, but the Commission may surely require an interstate carrier to cease and desist from giving its competitor more cars than the competitor is entitled to receive."

(Defendant closes.)

(Testimony closed.)

(Mr. Glasgow argued to the jury on behalf of the plaintiff.)

(Mr. Gowen argued to the jury on behalf of the defendant.)

(Mr. Glasgow replied on behalf of the plaintiff.)

(Court adjourned until Tuesday, November 25, 1919, at 10 o'clock A. M.)

PLAINTIFF'S EXHIBIT NO. 5.

W. F. JACOBY & COMPANY

Tonnage Statement **Falcon No. 2 Mine**

From **April 1st, 1904,** to **March 31st, 1905.**

Months.	Number of days in month.	Sundays.	Legal & Miner's holidays.	Line disabled and delays caused by accident, etc. DAYS.	Actual days mine was capable of producing its full daily capacity.	Penna. R. R. Co's. estimated capacity of Mine. Tons per days	Penna. R. R. Co's. estimated capacity of Mine. Total Tons for days capable of working.	Actual tons produced & shipped as per Penn. R. R. Co's Scale weights.	Tons short due to insufficient cars to load.
1904									
April ...	30	4	1	1	24	450	10,800.00	3,601.21	7,198.79
May	31	5	3	1¾	21¼	450	9,562.50	5,466.11	4,096.39
June	30	4	1	6¼	18¾	450	8,437.50	3,059.06	5,378.44
July	31	5	2	3¼	20¾	450	9,337.50	2,409.20	6,928.30
Aug.	31	4	1	3¼	22¾	450	10,237.50	3,932.02	6,305.48
Sept. ...	30	4	1	0	25	450	11,250.00	3,451.70	7,798.30
Oct.	31	5	0	2½	23½	450	10,575.00	3,801.42	6,773.58
Nov.	30	4	2	¼	23¾	450	10,687.50	3,589.68	7,097.82
Dec.	31	4	2	½	24½	450	11,025.00	3,015.93	8,009.07
1905									
Jan.	31	5	2	¼	23¼	450	10,575.00	2,379.64	8,195.36
Feb.	28	4	1	1¼	21¾	450	9,787.50	1,749.33	8,038.17
Mch. ...	31	4	0	1½	25½	450	11,475.00	2,258.93	9,216.07
Total..	365	52	16	22	275	450	123,750.00	38,714.23	85,035.77

W. F. JACOBY & COMPANY

Tonnage Statement Falcon No. 2 Mine.

From April 1st, 1905, to October 15th, 1905.

	Number of days in month.	Sundays.	Legal & Miner's holidays.	Mine disabled & delays caused by accident, etc. DAYS.	Actual days mine was capable of producing its full daily capacity.	Estimated capacity of Mine. Tons per days	Estimated capacity of Mine. Total tons for days capable of working.	Actual tons produced & shipped as per Penna. R. R. Co.'s. Scale weights.	Tons short due to insufficient cars to load.
....	30	5	3	½	21½	450	9,675.00	2,693.30	6,981.70
....	31	4	1	3½	22½	450	10,125.00	2,801.17	7,323.83
....	30	4	1	2½	22½	450	10,125.00	2,125.38	7,999.62
....	31	5	1	8½	16½	450	7,425.00	2,825.63	4,599.62
....	31	4	1	3	23	450	10,350.00	2,855.40	7,494.60
...	30	4	2	2¼	21¾	450	9,787.50	3,560.55	6,226.95
....	14	2	0	1½	10½	450	4,725.00	1,112.45	3,612.55
otal..	197	28	9	21¾	138¼	450	62,212.50	17,973.88	44,038.87

PLAINTIFF'S EXHIBIT NO. 8.

STATEMENT OF CLAIM.

April 1, 1904, to April 1, 1905.

Falcon No. 2 Mine

W. F. Jacoby & Company v. Penna. R. R. Co.

For loss sustained on account of excessive cost of production due to inadequate car supply.

Actual cost, Statement #1	$1.01696	Ex. #3
Normal cost, Statement #2	.89305	Ex. #6
	$ .12391	

38,714.23 tons actual production @ .12391,			$ 4,738.27
For loss of profit on tonnage which Plaintiff failed to produce owing to inadequate car supply.			
Average market price, Statement #3,	$1.21270		
Normal cost, Statement #2,	.89305		
	$ .31965		
85,035.77 tons @ .31965,			27,181.68
123,750.00 tons possible production, Statement #4.		Total	$31,919.95

Interstate Commerce Commission
Docket No. 1139 Date 5/15/08
Exhibit No. 8 Witness
Stenographer Jacoby
RWP.

STATEMENT OF CLAIM.

April 1, 1905, to October 15, 1905.

Falcon No. 2 Mine

W. F. Jacoby & Company v. Penna. R. R. Co.

For loss sustained on account of excessive cost of production due to inadequate car supply.		
Actual Cost, Statement #5,	$1.04982	
Normal cost, Statement #2.	.89305	
	$ .15677	
,973.88 actual production @ .15677,		$2,817.77
For loss of profit on tonnage which plaintiff failed to produce owing to inadequate car supply.		
Average market price, Statement #6,	$1.16736	
Normal cost, Statement #2,	.89305	
	$ .27431	
,238.62 tons @ .27431,		12,135.09
,212.50 tons possible production #7,	Total,	$14,952.86

Grand Total,

$31,919.95
14,952.86

$46,872.81

PLAINTIFF'S EXHIBIT NO. 10.

DETAIL STATEMENT SHOWING DISCRIMINATION IN FAVOR OF OTHER MINES AND AGAINST FALCON NO. 2 from April 1, 1904, to April 1, 1905.

	Rated Capacity Based on 308 distribut'n days 32 Tons per car		Shipped Based on 32 tons per car		Per	28% Would be		Difference in excess of Falcon No. 2		
	Cars	Tons	Cars	Tons	Cent	Cars	Tons	In cars	In tons	In p. cent
Falcon No. 2	4,331	138,600	1,237	38,874	28.0					
Electric	4,812	154,000	2,802	89,632	58.2	1,347	43,120	1,454	46,512	30.2
Lenore	1,444	46,200	879	28,128	60.8	404	12,936	475	15,192	32.8
Leland No. 1	2,888	92,400	2,122	67,904	73.5	809	25,872	1,313	42,032	45.5
White Oak	1,323	42,350	598	19,136	45.2	370	11,858	228	7,278	17.2
Penn No. 3	2,406	77,000	1,623	51,936	67.4	673	21,560	950	30,376	39.4
Peerless Nos. 1, 2, 3	1,450	46,400	957	30,624	68.2	406	12,992	551	18,632	40.2
Coaldale No. 11	3,128	100,100	1,612	51,584	51.5	876	28,028	736	23,556	23.5
Betz-Bucher	2,566	82,100	1,244	39,808	48.4	718	22,988	526	16,820	20.4
Corona	2,366	75,700	1,026	32,832	43.3	662	21,196	364	11,636	15.3
Standard No. 7	963	30,800	856	27,392	88.9	270	8,624	586	18,768	60.9
B.-W. Co. (7 mines)	24,260	776,325	13,452	430,464	55.5	6,793	217,311	6,659	213,153	27.5
L. V. Coal Co.	12,031	385,000	8,538	273,216	70.9	3,363	107,800	5,175	165,416	
		1,908,375	35,708	1,142,656	59.9	16,691	534,285	19,017	609,371	42.9

INTERSTATE COMMERCE COMMISSION

Docket No. 1129 Date 10-7-08

Complainant's

Exhibit No. 10 Witness Jacoby

Stenographer W.L.F.

DETAIL STATEMENT SHOWING DISCRIMINATION IN FAVOR OF OTHER MINES AND AGAINST FALCON NO. 2 from April 1, 1905, to October 15, 1905.

	Rated Capacity Based on 167 distribut'n dys 32 Tons per car		Shipped Based on 32 tons per car		Per	23.9% Would be		Difference in excess of Falcon No. 2		
	Cars	Tons	Cars	Tons	Cent	Cars	Tons	In Cars	In Tons	In P. Cent
Falcon No. 2	2,348	75,150	541	17,973	23.9					
Electric	2,609	83,500	1,376	44,032	52.7	624	19,968	752	24,064	28.8
Penn Nos. 5 and 6.....	1,827	58,450	1,197	38,304	65.5	437	20,160	760	18,144	41.6
Bucher	2,088	66,800	1,398	44,736	66.9	334	10,688	1,064	34,048	43.0
Corona	1,566	50,100	640	20,480	40.8	374	11,968	266	8,512	16.9
Fairmount No. 2	1,305	41,750	773	24,736	59.2	312	9,984	461	14,752	35.3
Rabold	1,044	33,400	757	24,224	72.5	250	8,000	507	16,224	48.6
Penn No. 3	1,305	41,750	725	23,200	55.5	312	9,984	413	13,216	31.6
Coaldale No. 11	1,827	58,450	1,018	32,576	55.7	437	13,984	581	18,592	31.8
Weston	1,305	41,750	593	18,976	45.4	312	9,984	281	8,992	21.5
Standard No. 7	522	16,700	401	12,832	76.8	125	4,000	276	8,832	52.9
B. W. & Co. (5 mines)..	11,481	367,400	7,154	228,928	62.3	2,744	87,808	4,410	141,120	38.4
		860,050	16,032	513,024	59.6	6,261	206,528	9,771	306,496	

INTERSTATE COMMERCE COMMISSION

Docket No. 1139 Date 10/7/08

Compls. Exhibit No. 11

Witness Jacoby

Stenographer WLF

Months	Distribution Days	FALCON No. 2			ELECTRIC			LENORE			LELAND No. 1			WHITE OAK			PENN No. 3			PEERLESS	
		Cars Received	Rating	P. C.	Cars Received	Rating	P. C.	Cars Received	Rating	P. C.	Cars Received	Rating	P. C.	Cars Received	Rating	P. C.	Cars Received	Rating	P. C.	Cars Received	Rating
1904																					
April	26	112	450	2.6	295	500	2.8	83	150	0.8	153	200	1.1	74	100	0.6	177	250	1.4	135	200
May	25	103	"	"	304	"	"	41	"	"	172	"	"	55	"	"	156	"	"	117	"
June	26	90	"	"	34	"	"	98	"	"	150	"	"	89	"	"	123	"	"	22	"
July	25	87	"	2.5	48	"	"	68	"	"	134	"	"	59	150	0.8	85	"	"	93	250
August	27	127	"	"	211	"	"	63	"	"	233	"	"	72	"	"	48	"	"	Idle	"
Sept.	25	121	"	"	229	"	"	68	"	"	196	"	"	38	"	"	122	"	"	36	"
Oct.	26	111	"	2.3	290	"	2.6	39	"	"	223	400	2.0	73	"	"	38	"	1.2	37	"
Nov.	25	111	"	"	280	"	"	77	"	"	207	"	"	42	"	"	155	"	"	139	"
Dec.	26	107	"	"	329	"	"	86	"	"	236	"	"	49	"	"	164	"	"	79	"
1905																					
Jan.	26	78	"	"	315	"	"	70	"	"	155	"	"	22	"	"	209	"	"	118	"
Feb.	24	56	"	"	265	"	"	84	"	"	105	"	"	09	"	"	136	"	"	59	"
March	27	74	"	2.2	201	"	"	102	"	"	158	"	"	16	"	0.7	110	"	"	131	350
Total.....	308	1237			2801			879			2122			598			1623			957	

Months	Distribution Days	FALCON #2			ELECTRIC			PENN #5 & 6			BUCHER			CORONA			FAIRMOUNT #2		
		Cars Received	Rating	P. C.	Cars Received	Rating	P. C.	Cars Received	Rating	P. C.	Cars Received	Rating	P. C.	Cars Received	Rating	P. C.	Cars Received	Rating	P. C.
1905																			
April	26	87	450	2.2	169	500	2.6	152	350	1.7	186	400	2.0	87	300	1.5	145	250	1.2
May	26	95	"	"	200	"	"	181	"	"	168	"	"	98	"	"	134	"	"
June	26	71	"	"	196	"	"	204	"	"	225	"	"	84	"	"	99	"	"
July	25	92	"	2.1	159	"	2.3	201	"	1.6	241	"	1.8	114	"	1.4	112	"	1.2
August	27	81	"	"	222	"	"	148	"	"	232	"	"	106	"	"	99	"	"
Sept.	25	85	"	"	296	"	"	201	"	"	236	"	"	98	"	"	141	"	"
Oct. (15th)..	12	32	"	"	134	"	"	110	"	"	108	"	"	53	"	"	43	"	"
Total.....	167	541			1376			1197			1398			640			773		

PLAINTIFF'S EXHIBIT NO. 11.

COMPARATIVE STATEMENT APRIL 1, 1904, TO APRIL 1, 1905.

Taken from Pennsylvania Railroad Distribution Sheets.

1-2-3	BELFAST COALDALE No. 11			BETZ No. 1 BUCHER			CORONA			STANDARD No. 7			L. V. COAL CO. Rating 66 % 1250 Tons			CARS RECEIVED				BERWIND	
P. C.	Cars Received	Rating	P. C.	Cars Received	Rating	P. C.	Cars Received	Rating	P. C.	Cars Received	Rating	P. C.	L.V. Cars	P.R.R. Cars	Total	Individual Cars	Company's Coal	Comm'l	Total	Eureka #5	P. C.
1.1	125	300	1.7	Idle	300	1.7	91	150	0.8	48	100	0.6	360	96		734	53	79	866	250	1.4
"	122	"	"	"	"	"	84	"	"	107	"	"	651	188		800	145	16	961	"	"
"	98	"	"	"	"	"	149	"	"	58	"	"	41	440		753	104	42	899	200	1.1
1.4	125	"	1.6	105	"	"	104	250	1.4	100	"	"		816		850	98		948	"	"
"	56	"	"	170	"	"	92	"	"	61	"	"		343		745	102	25	872		
"	188	"	"	161	"	"	88	"	"	32	"	"	365	381		710	104	59	873		off 8/20
"	157	350	1.8	193	400	2.0	109	300	1.5	71	"	0.5	426	335		868	127	17	1012		
"	117	"	"	157	"	"	68	"	"	72	"	"	389	301		902	180		1082		
"	172	"	"	127	"	"	63	"	"	102	"	"	458	377		961	247	34	1242		
"	46	"	"	80	"	"	41	"	"	69	"	"	478	400		1049	219	82	1350		
"	86	"	"	112	"	"	50	"	"	70	"	"	476	294		1201	205	71	1477		
1.7	120	"	1.7	139	"	"	87	"	"	61	"	"	623	300		1645	190	35	1870		
—	1612	—	—	1244	—	—	1026	—	—	856	—	—	4267	4271	8538	11218	1774	460	13452		

COMPARATIVE STATEMENT APRIL 1, 1905 TO OCTOBER 15, 1905.

Taken from Pennsylvania Railroad Distribution Sheets.

Cars Received.	RABOLD		PENN. #3			COALDALE #1			WESTON			STANDARD #7			CARS RECEIVED				BERWI		
	Rating	P. C.	Cars Received	Rating	P. C.	Cars Received	Rating	P. C.	Cars Received	Rating	P. C.	Cars Received	Rating	P. C.	Individual Cars	Company's Coal	Commercial	Total	Eureka #7	P. C.	Eureka #16
111	200	1.0	126	250	1.2	108	350	1.7	69	250	1.2	65	100	0.5	985	171	18	1174	400	2.0	250
100	"	"	160	"	"	175	"	"	102	"	"	58	"	"	872	163	8	1043	"	"	"
112	"	"	124	"	"	165	"	"	132	"	"	54	"	"	874	140	13	1027	"	1.8	"
117	"	0.9	51	"	1.2	160	"	1.6	146	"	1.2	70	"	"	885	99	—	979	"	"	"
113	"	"	72	"	"	191	"	"	58	"	"	68	"	"	755	109	02	866	"	"	"
137	"	"	110	"	"	144	"	"	59	"	"	55	"	"	1400	111	—	1511	"	"	"
67	"	"	82	"	"	75	"	"	27	"	"	21	"	"	480	55	19	554			
757	—	—	725	—	—	1018	—	—	593	—	—	401	—	—	6251	843	60	7154	—	—	—

BERWIND-WHITE COAL MINING COMPANY (7 MINES)
MINE RATINGS

Eureka #5	P. C.	Eureka #7	P. C.	Eureka #16	P. C.	Eureka #22	P. C.	Eureka #27	P. C.	Eureka #28	P. C.	Atlantic #1	P. C.
250	1.4	500	2.8	250	1.4	250	1.4	375	2.1	675	3.8	250	1.4
"	"	"	"	"	"	"	"	"	"	"	"	"	"
200	1.1	400	2.2	"	"	"	"	"	2.0	1000	5.6	200	1.1
"	"	"	"	"	"	"	"	"	"	"	"	"	"
		"	"	"	"	"	"	"	"	"	"	"	"
	off 8/20		"	"	"	"	"	"	"	"	"	"	"
		"	2.0	"	1.2	"	1.2	"	1.9	"	5.1	"	1.0
		"	"	"	"	"	"	"	"	"	"	"	"
		"	"	"	"	"	"	"	"	"	"	"	"
		"	"	"	"	"	"	"	"	"	"	"	"
		"	"	"	"	"	"		"	"	"	"	"
								off 3/20		"	5.0	300	1.4

BERWIND-WHITE COAL MINING COMPANY (5 MINES)
MINE RATINGS

Eureka #16	P. C.	Eureka #22	P. C.	Eureka #27	Eureka #28	P. C.	Atlantic #1	Per Cent.
250	1.2	250	1.2		1000	5.1	300	1.4
"	"	"	"		"	"	"	"
"	"	"	"		"	4.6	"	"
"	"	"	"		"	"	"	"
"	"	"	"		"	"	"	"
"	"	"	"		"	"	"	"

PLAINTIFF'S EXHIBIT NO. 12.

INTERSTATE COMMERCE COMMISSION
Docket No. 1169 Date 10/7/08
Complainant's Exhibit No. 12
Stenographer Witness Jacoby
W. L. F.

W. F. Jacoby & Company v. Pennsylvania R. R. Co.

Amended Statement of Claim.

For loss sustained due to discrimination in car supply from April 1, 19
to April 1, 1905:

Tonnage actually shipped by 20 certain mines on Tyrone Divis
during said period, as shown by Penna. R. R. Co.'s Distribution She
and by Statement #10 herewith.

1,142,050 tons 35,708 cars, being 59.9% of full rated cap.
Falcon #2, 38,714 tons 1,237 cars, being 28.0% of full rated cap.

Discrimination in favor of other mines,
and against Falcon #2. 31.9%

59.9% of Falcon #2 full rated capacity would be,	83,028 to
Falcon #2 actually shipped,	38,871 "
Discrimination against Falcon #2,	44,157 to
Loss sustained on 44,157 tons, see Statement #8 herewith \ Exhibit No. 13 /	$25,28
Loss sustained on account of excessive cost of production due to inadequate car supply. See Exhibit #8,	4,73
Additional loss sustained on account of discrimination against Tyrone Division and Falcon #2 mine, due to arbitrary assignment and sale of cars to other shippers as shown by testimony and detail statement #9 herewith. Ex. #13,	8,89
	$38,80
	$38,893.18
	15,110.33
Total,	$54,003.51

W. F. Jacoby & Company v. Pennsylvania R. R. Co.

Amended Statement of Claim.

For loss sustained due to discrimination in car supply from April 1, 1905, to October 15, 1905:

Tonnage actually shipped by 16 certain mines on Tyrone Division during said period, as shown by Penna. R. R. Co.'s Distribution Sheets, and by Statement #10 herewith.

	513,024 tons	16,032 cars,	being 59.6%	of full rated capacity
Falcon #2.	17,973 tons	541 cars,	being 23.9%	of full rated capacity

Discrimination in favor of other mines, and against Falcon #2,	35.7%	
59.6% of Falcon #2 full rated capacity would be		44,791 tons
Falcon #2 actually shipped		17,973 "
Discrimination against Falcon #2,		26,818 tons
Loss sustained on 26,818 tons. See statement herewith		$9,654.48
Loss sustained on account of excessive cost of production due to inadequate car supply. See Exhibit #8.		2,817.77
Additional loss sustained on account of discrimination against Tyrone Division and Falcon #2 mine, due to arbitrary assignment and sale of cars to other shippers as shown by testimony and detail statement #9 herewith,		2,638.08
		$15,110.33

INTERSTATE COMMERCE COMMISSION
Docket No. 1139 Date 10/7/08
Complainant's Exhibit No. 13
Stenographer W. L. F. Witness Jacoby

PLAINTIFF'S EXHIBIT NO. 13.

STATEMENT NO. 8.

	59.9% of Rated Capacity.	Tonnage actually shipped	Shortage	Current Market Prices		Producing a total market value of;	Est'd cost to produce same see Statement =2	Profit Lost
1904								
April	6,919	3,627	3,292	A	$1.35	$4,444.20	$2,929.88	$1,514.32
May	6,919	5,478	1,441	B	1.35	1,945.35	1,282.49	662.86
June	6,919	3,058	3,861	C	1.25	4,826.25	3,436.29	1,389.96
July	6,919	2,409	4,510	D	1.25	5,637.50	4,013.90	1,623.60
August	6,919	3,937	2,982	E	1.25	3,727.50	2,653.98	1,073.52
September	6,919	3,467	3,452	F	1.25	4,315.00	3,072.28	1,242.72
October	6,919	3,814	3,105	G	1.35	3,791.25	2,763.45	1,027.80
November	6,919	3,590	3,329	H	1.40	4,660.60	2,962.81	1,697.79
December	6,919	3,037	3,882	I	1.60	6,211.20	3,454.98	2,756.22
1905								
January	6,919	2,405	4,514	J	1.75	7,899.50	4,017.46	3,882.04
February	6,919	1,773	5,146	K	1.75	9,005.50	4,579.94	4,425.56
March	6,919	2,276	4,643	L	1.75	8,125.25	4,132.27	3,992.28
								$25,288.67
	83,028	38,871	44,157					
1905	(59.6%)							
April	6,891	2,693	4,198	M	$1.25	$5,247.50	$3,736.22	$1,511.28
May	6,891	2,801	4,090	N	1.25	5,112.50	3,640.10	1,472.40
June	6,981	2,125	4,766	O	1.25	5,957.50	4,241.74	1,715.76
July	6,891	2,826	4,065	P	1.25	5,081.25	3,617.85	1,463.40
August	6,891	2,855	4,036	Q	1.25	5,045.00	3,592.04	1,452.96
September	6,891	3,561	3,330	R	1.25	4,162.50	2,963.70	1,198.80
October	3,445	1,112	2,333	S	1.25	2,916.25	2,076.37	839.88
								$9,654.48

STATEMENT OF TONNAGE LOST DUE TO DISCRIMINATION AGAINST TYRONE REGION, AND FALCON NO. 2 MINE, AS SHOWN BY TESTIMONY.

	Dis. Days	Tyrone Regions portion, or 10.9% of 640 cars per day would be:	Cars due Falcon #2 as per P.R.R. Co's rated capacity.	Tonnage lost based on 32 tons per car.	Current Market Prices.		Producing a total market value of:	Est'd cost to produce same see Statement #2.	Profit Lost.
1904									
April	26	1,813	47	1,504	A	$1.35	$2,030.40	$1,338.56	$691.84
May	25	1,743	45	1,440	B	1.35	1,944.00	1,281.60	662.40
June	26	1,813	47	1,504	C	1.25	1,880.00	1,338.56	541.44
July	25	1,743	43	1,376	D	1.25	1,720.00	1,224.64	495.36
August	27	1,883	47	1,504	E	1.25	1,880.00	1,338.56	541.44
September	25	1,743	43	1,376	F	1.25	1,720.00	1,224.64	495.36
October	26	1,813	41	1,312	G	1.35	1,771.20	1,166.68	604.52
November	25	1,743	40	1,280	H	1.40	1,792.00	1,139.20	652.80
December	26	1,813	41	1,312	I	1.60	2,099.20	1,166.68	932.52
1905									
January	26	1,813	41	1,312	J	1.75	2,296.00	1,166.68	1,129.32
February	24	1,673	38	1,216	K	1.75	2,128.00	1,082.24	1,045.76
March	27	1,883	39	1,248	L	1.75	2,184.00	1,110.52	1,073.48
Totals				16,384					$8,866.24
1905		(10.2%)							
April	26	1,697	36	1,152	M	$1.25	$1,440.00	$1,025.28	$414.72
May	26	1,697	36	1,152	N	1.25	1,440.00	1,025.28	414.72
June	26	1,697	36	1,152	O	1.25	1,440.00	1,025.28	414.72
July	25	1,632	34	1,088	P	1.25	1,360.00	968.32	391.68
August	27	1,763	37	1,184	Q	1.25	1,480.00	1,053.76	426.24
September	25	1,632	34	1,088	R	1.25	1,360.00	968.32	391.68
October	12	783	16	512	S	1.25	640.00	455.68	184.32
Totals				7,328					$2,638.08

Plaintiff's Exhibit No. 13

DEFENDANT'S EXHIBIT NO. 2.

INTERSTATE COMMERCE COMMISSION
Docket No. 1139 10/7/08
Exhibit No. 2 Witness Trump
Stenographer W.L.F

TYRONE REGION RATING AND CARS PLACED THEREIN.

Month & Year		Region rating in Cars	Assigned Cars Placed Co. Coal	Individual	Total	Commercial Cars Placed
April	1904	18,434	958	1,526	2,484	3,234
May	"	17,725	901	1,418	2,319	3,411
June	"	18,460	762	1,241	1,993	2,570
July	"	18,125	601	1,242	1,843	2,280
August	"	19,689	703	1,156	1,859	2,991
September	"	18,179	698	1,049	1,747	3,070
October	"	19,545	904	1,407	2,311	3,242
November	"	18,564	1,148	1,696	2,844	3,105
December	"	20,548	1,650	1,640	3,290	3,215
January	1905	20,740	1,338	1,642	2,980	2,637
February	"	19,194	1,720	2,066	3,786	2,045
March	"	22,314	1,135	3,167	4,302	2,856
April	"	20,750	1,540	2,135	3,675	2,491
May	"	21,580	1,527	1,900	3,427	2,753
June	"	21,580	1,879	1,866	3,745	2,163
July	"	21,550	1,577	1,706	3,283	2,762
August	"	23,286	1,671	1,882	3,553	2,399
September	"	21,620	1,991	2,245	4,236	3,027
October	"	22,568	2,781	2,555	5,336	3,113
Total,		385,451	25,474	33,539	59,013	53,454

DEFENDANT'S EXHIBIT "A."

DISTRIBUTION OF CARS PLACED IN THE TYRONE REGION.

Month & Year	*Region Rating in Cars*	*Fuel Cars of Dept.*	*Individual or Private Cars*	*Other Cars*
1904				
April	18,434	958	1,526	3,234
May	17,725	901	1,418	3,411
June	18,460	752	1,241	2,570
July	18,125	601	1,242	2,280
August	19,689	703	1,156	2,991
Sept.	18,179	698	1,049	3,070
Oct.	19,545	904	1,407	3,242
Nov.	19,564	1,148	1,696	3,195
Dec.	20,548	1,650	1,640	3,215
1905				
Jan.	20,740	1,338	1,642	2,637
Feb.	19,194	1,720	2,066	2,045
March	22,314	1,135	3,167	2,856
April	20,750	1,540	2,135	2,491
May	21,580	1,527	1,900	2,753
June	21,580	1,879	1,866	2,163
July	21,550	1,577	1,706	2,762
August	23,286	1,671	1,882	2,399
Sept.	21,620	1,991	2,245	3,027
Oct.	22,568	2,781	2,555	3,113
Total	385,451	25,474	33,539	53,454

TYRONE REGION (Including Snow Shoe Region).
April, 1904, to March, 1905, Inc.

Month		*Region Rating in Cars Inc. Snow Shoe Reg.*	*Total Cars Placed Inc. Snow Shoe Reg.*
April	1904	20,384	6,317
May	"	19,600	6,652
June	"	20,410	5,145
July	"	20,000	5,295
August	"	21,714	5,312
September	"	20,054	5,748
October	"	21,495	6,462
November	"	21,439	6,899
December	"	22,498	7,514
January	1905	22,690	6,869
February	"	20,994	6,912
March	"	24,339	8,305
Total		255,617	77,430

April, 1905, to October, 1905, Inc.

Month		*Region Rating in Cars Inc. Snow Shoe Reg.*	*Total Cars Placed Inc. Snow Shoe Reg.*
April	1905	22,625	6,385
May	"	23,530	6,784
June	"	23,530	6,415
July	"	23,425	6,572
August	"	25,311	6,412
September	"	23,495	8,017
October	"	24,518	9,250
Total		166,434	49,834

DEFENDANT'S EXHIBIT "B."

September 23, 1910.

Owing to error the dissent of Commissioner Lane in this case was omitted from the first edition. This copy contains such dissent, and is mailed for your information. The effective date of the order has been changed to December 1, 1910.

Opinion No. 1383.

CERTIFIED COPY.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY.

Decided March 7, 1910.

REPORT AND ORDER OF THE COMMISSION.

Defendant's Exhibit "B"

(Certified Copy.)

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY.

Submitted January 25, 1909. Decided March 7, 1910.

REPORT AND ORDER OF THE COMMISSION.

1. To the physical capacity of a coal mine the defendant adds its commercial capacity tested by the shipments made from it during the preceding 12 months, and divides the sum by two; these two factors being revised quarterly the mine is thus given a constantly corrected rating in the distribution of coal cars during percentage periods. If this basis is equitably applied to all mines served by the defendant the Commission is unable to see that it results in an unequal, unfair, or discriminatory distribution of its equipment.

2. The complainant's contention that physical capacity alone is the fair and sound basis for rating coal mines for car distribution is not sustained; the utmost obligation of a carrier under the law is to equip itself with sufficient cars to meet the requirements of a mine for actual shipment; and it is of no real concern to the carrier what are the physical possibilities of a mine in the way of daily output except as that factor may afford some measure of what its actual shipments will be.

3. The Commission reaffirms its previous ruling to the effect that the owner of private cars is entitled to their exclusive use and that foreign railway fuel cars assigned to a particular mine can not be delivered to another mine; but it again holds that all such cars must be counted against the distributive share of the mine receiving them. It is therefore *Held*, That the defendant's rule, providing that the capacity in tons of such "assigned" cars shall be deducted from the rated capacity of the mine receiving them and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all "unassigned" cars is unlawful and discriminatory.
4. The defendant's contention that so long as the petitioner receives all the coal cars it is entitled to, it has no right to complain because some other operator receives an undue proportion of cars is not sustained. The law not only gives the shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier but the assurance also that no other shipper shall fare ratably better at the hands of the carrier.
5. The question of damages, which the complainant claims to have suffered as the result of the discriminations herein found to have been practiced against it, reserved for further argument.

David L. Krebs and *Harry White* for complainant.

Francis I. Gowen, George V. Massey, and *Murray & O'Laughlin* for Pennsylvania Railroad Company.

REPORT OF THE COMMISSION.

HARLAN, *Commissioner:*

In this group of cases, of which the above-entitled complaint has been selected as the one in which the

views of the Commission may best be expressed, the petitioners bring to our attention the method or rules in effect on the lines of the defendant, during the period mentioned in the complaints, for the distribution of coal cars among the coal mines which the defendant serves. In each case the petitioner demands an order by the Commission requiring the defendant so to change or modify its rules that the distribution of its coal-car equipment may be made on what they regard as a more equitable and just basis. Damages in large amounts are also asked in order that the several complainants may be compensated for losses which they claim to have suffered by reason of the alleged failure of the defendant during the period of the action to give them the number of cars that they were justly entitled to receive.

The consideration of these complaints has been deferred because, when they were submitted for decision, there were pending in the lower courts and before the Supreme Court of the United States cases involving not only the question of the soundness and legality of the rulings heretofore made by the commission respecting the distribution of coal cars by interstate carriers, but involving also the power and authority of the Commission to control and enter orders in respect to the practices of interstate carriers in such matters. Under the circumstances it seemed wise to await the final disposition of those cases in the court of last resort before making any further announcement of our views with respect to the matter of coal-car distribution; and this course seemed particularly desirable in view of the fact that the defendant in this proceeding, although not a party to any of the appeals in the Supreme Court of the United States, had been permitted, upon its special request and because of its interest in the questions involved, to participate in the argument and presentation of the cases before that court.

The general status of the question before the Commission may be readily ascertained by an examination of our decisions in one or two formal proceedings since the passage of the so-called Hepburn Act. In *Railroad Commission of Ohio v. H. V. Ry. Co.*, 12 I. C. C. Rep., 398, we held that while a carrier during periods of car shortage might not assign privately owned cars to operators other than their owners, and might not assign foreign railway fuel cars to any mines except those to which they had been manifested by the foreign lines, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belonged or to which the foreign railway fuel cars had been consigned; and in case the private cars or foreign railway fuel cars so delivered to a mine were not sufficient to fill out its distributive share of available coal cars, it should have in addition only so many of the system cars of the carrier as might be necessary, when added to the private or foreign railway fuel cars so received by it, to make up its full ratable proportion of the total available coal cars of all classes. We also held that all foreign railway fuel cars consigned to a particular operator, and all private cars owned by a particular operator, must be delivered to that operator, even though their number might exceed the ratable proportion of the particular mine in the distribution of available cars.

The order then entered to give effect to these conclusions was accepted by the defendant in that proceeding. But when the same general principle was applied by the Commission in *Traer v. C. & A. R. R. Co.*, 13 I. C. C. Rep. 451, to the distribution of company fuel cars the defendant in the latter proceeding declined to accept our order either as one within the power of the Commission to enter or as a just and proper disposition of the contention made upon the record. In the same report we disposed of similar

complaints by the same petitioner against the Illinois Central Railroad Company and the Chicago, Peoria & St. Louis Railway Company. These companies also declined to obey our order. The result was proceedings in the United States Circuit Court for the Northern District of Illinois, the Illinois Central and the Chicago & Alton being the moving parties, in which that court held that the complainant carriers were not entitled to relief from that part of the orders of the Commission that required private and foreign railway fuel cars to be taken into account against the distributive share of the coal companies receiving them, but were entitled to an injunction restraining the enforcement of the orders of the Commission in so far as they related to the cars employed by the complaining carriers in hauling their own fuel coal. From this decree an appeal to the Supreme Court of the United States was prosecuted by the Commission and the whole question was considered by that tribunal in *Interstate Commerce Commission v. I. C. R. R. Co.*, 215 U. S. 452, and *Interstate Commerce Commission v. C. & A. R. R. Co.*, 215 U. S. 479, in which decisions have lately been announced.

The court there held, as the Commission had previously held in *Rail & River Coal Co. v. B. & O. R. R. Co.*, 14 I. C. C. Rep. 86, that the basis adopted by an interstate carrier for the distribution of coal cars among coal operators upon its lines was a regulation or practice "affecting rates" as that phrase is used in section 15 of the amended act to regulate commerce, and as such was a matter within the regulative power of the Commission. It was also held that the fuel cars of an interstate carrier, in which it hauls fuel for its own use, are instruments of interstate commerce as fully as are its system cars in which commercial coal is hauled for shippers; and consequently "that such cars are embraced within the governmental power of regula-

tion which extends, in time of car shortage, to compelling a just and equitable distribution and the prevention of an unjust and discriminatory one." Drawing attention to the distinction that must necessarily be observed by the courts between the power to regulate and the unwise exercise of the power in a given case, that court disclaimed for itself, and also denied to any other federal court, the right to usurp the purely administrative functions of the Commission by substituting a regulation that the court might deem wise for one which it considered the Commission in the exercise of its conceded power had inexpediently adopted. The decree of the lower court enjoining the enforcement of the order of the Commission, in so far as it related to the distribution of company fuel cars, was therefore reversed.

It thus appears that the orders of the Commission with respect to the distribution of coal cars by interstate carriers, as expressed in the several cases referred to, remain unaffected by the attacks that have been made upon them in the courts. And our further consideration of these questions in connection with this group of cases has confirmed our conviction that the general principles underlying the disposition made of the previous cases are both sound and just. We shall therefore proceed to ascertain what has been and is now the practice of the defendant in respect to the distribution among coal operators of its available coal-car equipment, and how far it differs, if at all, from what the Commission has regarded and, in the cases referred to, has announced as the just and equitable basis of distribution. It may be well, however, first to say a word in respect to the method or basis in effect on the lines of the defendant for assigning to each of the coal mines that it serves a daily output rating for determining its proportion in the distribution of coal cars, that being one of the practices of the defendant

of which complaint is made by the petitioner herein, as well as by the petitioners in the other cases in this group.

In *Rail & River Coal Co. v. B. & O. R. R. Co.*, 14 I. C. C. Rep. 86, it appeared that the method of rating mines adopted by that carrier involves two principal factors, (*a*) the physical capacity of the mine, and (*b*) its commercial capacity. The physical capacity is ascertained in the manner explained in our report of that case (*id.*, p. 93) and the method need not therefore again be described. It will suffice to say that it is substantially the plan now generally followed by coal-carrying roads. The commercial capacity, or the requirement of a mine for cars as tested by its actual shipments is arrived at by taking the volume of the shipments made by a mine during a period of free-car supply, usually of four months and generally from April 1 to August 1, in each of the two preceding years. The three figures, expressed in coal tons, namely, the physical capacity, the commercial capacity for the first year, and the commercial capacity for the second year, are added together and the sum is divided by three. The result is the capacity basis that is established by the Baltimore & Ohio for determining the percentage of the available coal equipment that the particular mine is entitled to receive during any period of car shortage. After a careful consideration of the system as applied to interstate shipments, we were inclined to think and so intimated (*id.*, p. 96), that a method of rating coal mines based upon a combination of their physical and commercial capacities more closely approximates their actual car requirements than a system based upon physical capacity only.

But in this petition the complainant, as we understand its attitude, demands that the commercial capacity of the mines served by the defendant shall be eliminated as a factor in fixing their rating and that

their physical capacity shall be accepted as the sole factor for determining their respective proportions in the distribution of coal cars. The defendant, while combining the physical with the commercial capacity, does so in a way that differs somewhat from the plan in effect on the Baltimore & Ohio. To the physical capacity of a mine it adds its commercial capacity for one year only and divides the sum by two. The commercial capacity, however, is not based upon shipments made from a mine during a substantial period of free-car supply, as is the case on the Baltimore & Ohio, but upon the entire volume of shipments made from the mine throughout the preceding twelve months. The ratings are revised quarterly on February 1, May 1, August 1 and November 1; the rating of any particular operation will also be revised by the defendant upon request regardless of the quarterly tests. In other words, the commercial capacity of each mine is brought up to date at each quarterly rating period by taking into consideration its new tonnage for three months and adding to it the tonnage of the preceding nine months previously used in the preceding rating. In this manner the defendant endeavors to follow up as closely as possible the fluctuations in the market, labor conditions, and car supply. By combining the commercial capacity of a mine, thus ascertained and constantly brought up to date, with its physical capacity, the rating of the mine in the distribution of coal-car equipment is determined. And if this system of rating is equitably applied to all mines served by the defendant we are unable, so far as our investigations to the present time have informed us on the question, clearly to see upon what grounds it may be said to result in an unequal, unfair or discriminatory distribution of its equipment.

But, as heretofore stated, the complainant insists that the physical capacity of a mine is the sole and only proper basis for determining its rating for pur-

poses of car distribution. The economic waste involved in a system that leads operators to develop their mines beyond their commercial requirements and for the sole purpose of increasing their percentage of coal-car supply was discussed in *Rail & River Coal Co. v. B. & O. R. R. Co., supra.* While an order of the Commission in a particular case must necessarily fix the rights of the parties to the proceeding, so far as past shipments are concerned, and must necessarily restrain, until on further order, the continuance of the rate or practice that we condemn, and compel the carrier to observe the rate or practice that we prescribe for the future, these great questions of transportation are not foreclosed of further discussion and consideration upon further complaint. Additional experience with the actual operation of rules that combine commercial with physical capacity in the rating of coal mines for car distribution, may throw new light upon a matter that has vexed the Commission as well as many carriers that have endeavored to do equity as between different mines on their lines; and if so, we shall not hesitate to modify what has been said here and in other cases before us on that question. The principle of *stare decisis* has little application in proceedings before us involving questions of this nature. But at this time and upon the present state of our information and experience in the matter we can not accept the complainant's contention that physical capacity alone is the fair and sound basis for rating mines for car distribution. Speaking in precise terms, it is of no real concern to a carrier how large a particular mine may be and what are its possibilities in the way of daily output, except as those factors may afford some measure of what the actual shipments will be. The utmost obligation that the law lays upon the carrier is to equip itself with sufficient cars, not to meet the hopes and expectations of the owner of a mine as expressed in its physical

development, but to meet his actual shipments. A mine rating that is adjusted to the expectations of the operator and altogether ignores his actual requirements might easily result, in a period of car shortage, in giving him cars for every ton of coal that he can actually dispose of, while an adjoining mine, with a small development but a larger demand for its output, would get but a fraction of the equipment that it needs to meet its actual contracts.

In *Powhatan Coal & Coke Co. v. N. & W. Ry. Co.*, 13 I. C. C. Rep. 69, the record showed that thousands of dollars had been expended in the erection of additional ovens, not for actual use or to meet any commercial demand for more coke, but solely for the purpose of securing additional cars in the distribution by the carrier of its equipment during car shortage periods; and we there condemned a rule for the distribution of coke cars that ignored actual shipments and was based solely on the number of coke ovens that had been erected by the different coke companies. Nothing has since developed, or was suggested in this proceeding, to change our view on the general question, and the complainant's contention that physical capacity is the fair and reasonable basis for rating mines for car distribution must therefore be dismissed as untenable.

We come now to the practice of the defendant in the past and at the present time in the distribution of its available coal-car equipment.

Under a rule announced by it on February 1, 1903, the defendant seems to have charged all railroad cars, regardless of ownership, and private cars not owned by the operator loading them, against the distributive share of each mine, but it treated its own fuel cars as a special allotment in addition to the distributive share. On March 28, 1905, a notice was sent to shippers of bituminous coal from mines on the lines of the defendant advising them that thereafter all railroad cars,

regardless of ownership, and all private cars not owned by the operator loading them, should be considered as cars available for distribution, except its own company fuel cars and fuel cars sent upon its lines by foreign companies and specially consigned to particular mines.

On January 1, 1906, the defendant divided all cars into two classes which it designated as "assigned" and "unassigned" cars. In the former class were its own fuel cars, foreign railway fuel cars, and individual or private cars loaded by their owners or assigned by their owners to particular mines. The rule then made effective and still in force provides that the capacity in tons of any "assigned" cars shall be deducted from the rated capacity in tons of the particular mine receiving such cars, and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all "unassigned" or system cars. This order or rule of the defendant was the occasion of some comment in Logan Coal Co. v. P. R. R. Co., 154 Fed. Rep. 497, 498, where the Court says:

> "To illustrate the effect of the order on an individual number of cars as compared with a competitor receiving only company cars, take two operators each having mines rated at 500 tons a day, and assume that on any given day the company has enough of its own cars on hand to deliver to all mines cars which would take care of 70 per cent. of the output. Assume that one operator has individual cars available on that day for the shipment of 200 tons, while the other has no individual cars at all. The latter receives railway company cars capable of carrying 70 per cent. of 500 tons, or 350 tons. The former, on the day in question, will receive individual cars in which he can ship 200 tons, and his rating for a distribution of the company's cars for that day will be reduced to 300 tons, 70 per cent. of which is 210 tons, for the transportation of which he will receive company cars, so that the operator with the individual cars

will be able to ship on the day instanced 410 tons, as against the shipment of 350 tons by the operator who has no individual cars. To this extent the relator has the advantage over its competitors who do not own individual cars, and it receives the exclusive use of its cars at all times."

The results arrived at by the Court in its illustration seem to us not quite accurate, in that the total car capacity of 700 tons assumed by the court is made up of the company's system cars, and excludes from consideration the fact that one of the mines had on hand individual cars having a capacity of 200 tons, making a total available car capacity of 900 tons. Worked out on the basis of that total car tonnage the owner of the private cars would receive equipment enough to enable him to ship 463 tons and not 410 tons as stated by the court, while the mine depending upon system cars only would be able to ship 437 tons instead of 350 tons as stated by the court. The court used a car capacity of 70 per cent. as the total available equipment for the output of both mines instead of a car capacity of 900 tons, or 90 per cent., which was actually on hand in the case assumed. In other words, the court absorbs in its illustration only 760 tons of the output of the two mines, while the facts assumed show that car capacity of 900 tons was available. Under the Commission's rule each mine under these circumstances would have been able to ship 450 tons.

Using the same two mines with an assumed capacity of 500 tons each day and available equipment with a total capacity of 70 per cent. or 700 tons, including the individual cars with a capacity of 200 tons owned by one of the mines, the rule of distribution which this Commission has approved in *Railroad Commission of Ohio v. Hocking Valley Ry. Co.* and *Tracy v. C. & A. R. R. Co., supra*, would result in giving the latter mine its individual cars of 200 tons capacity and

system cars enough to absorb 150 additional tons, or a total of 350 tons, being one-half of the available equipment tonnage. The mine not owning the individual cars would get the other half of the available equipment tonnage, but all of it in system cars. Under the defendant's rule, on the other hand, the mine owning the individual cars would receive them and would thereby be able to ship 200 tons of its total output capacity of 500 tons a day. The rating of this mine would then be reduced to 300 tons a day as against the rating of 500 tons assigned to the mine owning no private cars, the total reduced rating for the two mines being 800 tons. Instead of 700 tons the equipment remaining available for distribution would carry but 500 tons, of which the mine owning individual cars would get three-eighths, or 188 tons, making its total tonnage 388 tons, while the other mine would get five-eighths, or system cars of a capacity of 312 tons, an advantage of 76 tons enjoyed by the mine owning private cars in the distribution of all available equipment. That mine under the defendant's rule would therefore be able to ship out between 20 and 25 per cent. more coal than its competitor, while under the rule approved by the Commission the shipments of the two mines would be the same under the facts assumed by the court in the case cited.

Referring to system fuel cars and foreign railway fuel cars consigned to a particular mine, the court in *Logan Coal Co. v. P. R. R. Co., supra*, said, p. 503:

> "The general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line, upon a basis giving each equal facilities with the other. Following are some of the cases in which these questions have been considered: *United States ex rel. Coffman v. N. & W.*

Ry. Co. (C. C.), 109 Fed. Rep. 831; *United States ex rel. Kingwood Coal Co. v. W. Va. & N. R. R. Co. et al.* (C. C.), 125 Fed. 252; *W. Va. & N. R. R. Co. et al. v. United States ex rel. Kingwood Coal Co.*, 134 Fed. 198, 67 C. C. A., 220; *United States ex rel. Greenbrier Coal & Coke Co. v. N. & W. Ry. Co.*, 143 Fed. 266, 74 C. C. A. 404; *State ex rel. v. C., N. O. & T. P. Ry. Co.*, 47 Ohio St. 130, 23 N. E. 928; *United States ex rel. Pitcairn Coal Co. v. B. & O. R. R. Co. et al.*, 154 Fed. 108."

That is the general theory for the distribution of coal-car equipment that has appealed strongly to this Commission as being fair, reasonable, and nondiscriminatory. We recognize the right of a company to contract with a particular operator for its fuel supply; we recognize the right of a connecting line also to do this; and each may send its cars to those mines to the exclusion of other mines. We also insist that the owner of private cars is entitled to their exclusive use. But in each case we hold that all such cars must be counted against the distributive share of the mine receiving them. When subjected in all its different phases to the scrutiny of the Supreme Court of the United States in the cases just decided and announced (*supra*) the position of the Commission in this matter was not found objectionable either on legal or constitutional grounds. And as the exhaustive arguments and our further consideration of the same questions in these proceedings have not given us any new light or led us to any different conclusions, the rulings in the previous cases must control the disposition of the complaints in this group of cases so far as they may be pertinent.

Upon all the facts shown of record the Commission therefore finds that throughout the period of the action the system upon which the defendant distributed its available coal-car equipment, including system fuel cars, foreign railway fuel cars, and individual or pri-

vate cars, has subjected the complainant to an undue and an unlawful discrimination. In this connection an important disclosure is made in a letter of record here, addressed to the president of the Clark Brothers Coal Mining Company under date of March 6, 1907, by the general superintendent of coal transportation of the defendant company. It is there stated that the distribution of coal cars on the lines of the defendant on that date was as follows:

	Per cent.
System cars for company coal	21
Foreign cars for supply coal	6
Individual cars	45
System cars for commercial coal	25
Foreign cars for commercial coal	3
Total	100

This condition of affairs emphasizes the inequity of a system of distribution that first deducts from the rated capacity of a mine the tonnage represented by the capacity of the cars specially assigned to it and then uses the remainder as a new basis for determining the proportion of unassigned cars that the mine is to have. The figures above given show that 72 per cent. of all the cars available on the lines of the defendant on the date mentioned were assigned cars, and but 28 per cent. were unassigned cars. Manifestly such a basis of distribution can have but one tendency, and that is, not only to steadily increase the physical capacity of the mines that regularly receive this large percentage of assigned cars, but also steadily to increase their commercial capacity, an advantage which the mines having the benefit of no assigned cars obviously can not enjoy. With such a large percentage of assigned cars it can not be doubted that the equipment furnished to some of these mines was sufficient

to approximate their ratings, while the small percentage of unassigned cars makes it equally clear that the mines having no other cars must have fallen substantially short of their ratings.

We further find that the continuance of that system of distribution for the future would be unlawful on the same grounds. Although the mine owning private cars or to which company or foreign railway fuel cars are consigned is entitled to receive them even though in excess of its ratable proportion of all available coal-car equipment, nevertheless the defendant will be required in the future to count all such cars against the distributive share of the mine so receiving them. It is scarcely necessary to add that the complainant's second request for a finding and for an order requiring the defendant, during percentage periods, to distribute ratably among operators, according to the actual output capacity of their mines, "all cars adopted to and used for carrying bituminous coal," whether company fuel cars, foreign railway fuel cars, or private cars, must be denied.

In view of our finding herein that the practice of the defendant in not counting assigned cars against the ratings of the mines has been discriminatory and has resulted in injury to the complainants in this group of cases, it is suggested that it will not be fair or equitable to content ourselves with the condemnation of that practice and the entry of an order requiring a different practice for the future; such a course, it is said, will leave the complainants under the disadvantage that the practice has wrought in the past, while giving to the favored mines the results that have wrongfully accrued to them. In other words, it is said that, under the rules here condemned, the preferred mines have been able year by year to enlarge their commercial output while the commercial output of the complainants and others has been restricted; and that

justice requires that there shall be a new point of departure, at least for the present, based solely upon the respective physical capacities of the mines on the lines of the defendant. Exact justice is ordinarily not attainable. It is difficult no less for this Commission than for a court to deal with such a situation as this with mathematical accuracy. The most that either may hope to accomplish in such a state of facts is to do substantial justice; and this we do, so far as it seems to us possible, when we require the defendant to adjust its rules on a proper basis for the future, and give to the complainants the opportunity to have their injuries redressed in the form of damages. While the tendency of the prior rules must have been to enlarge the commercial capacity of the preferred mines, we can not doubt that their physical capacity has also been enlarged. And we have no assurance that an order requiring the defendant, for the present as suggested, to distribute its cars on the basis solely of physical capacity would not, in some cases at least, work very substantial injustice.

That the practices of the defendant with respect to the rating of mines and the distribution of coal-car equipment were, to some extent at least, in a loose and unsatisfactory condition prior to 1905 not only appears in this record, but in the record of the coal and oil investigation made by the Commission under the joint resolution of the Congress approved on May 7, 1906. There seems at that time to have been a more or less well-defined policy on the part of the defendant to discourage the opening of new coal operations. But just how far this condition of affairs, prior to January 1, 1906, when the new regulations went into effect, may adversely have affected the complainant in a financial sense it is impossible upon this record to say. The increasing price received for coal in the general markets suggests the possibility that the coal not mined

at that time may subsequently have been mined and sold to the complainant's advantage. There are one or two other matters, however, of which complaint is made and to which it may be well here to refer.

The evidence shows that quite frequently, just how often not appearing, cars were placed at the mines of the petitioner too late to be loaded on that day, and one of the complaints made in the petition is that prior to January 1, 1906, the defendant charged such cars against the complainant's allotment not only for the day on which they were so placed but also against its allotment for the following day. It is even said that the complainant's mines were charged with cars placed there during the night. At the time in question, whatever may now be the case, it was the custom of the miners to enter the mines at 8 A. M., and under the rules then in effect, if cars were not on the siding ready for loading at that time but were received later during the day they would not be loaded until the next day. It does not appear just what the defendant's system was prior to January 1, 1906, with respect to the counting of cars placed at the mines for loading and not loaded until the following day. But the distribution sheets after that date contained a rule as follows:

> "A car placed too late for loading will not be counted as available for loading until the following day. A car available for loading and not loaded will be counted each day in column headed 'Empty cars over' until loaded or otherwise disposed of. A car loaded and not consigned will, unless consigned on the unloading day, be counted each day in column headed 'Unconsigned loads over' until consigned."

No claim is made upon the record that this rule, which seems still to be in effect, does not give fair results or that there is any discriminatory practice being carried on with respect to this phase of car

distribution. So far as concerns the defendant's practice before that date there seems to be no indication of any discrimination in this respect against the complainant in this or in the cases that follow it; nor is there any evidence that other mines were unduly favored in that regard.

It also appears that at an expense of about $5000 the complainant had constructed a tipple at its mine No. 2 and also a siding connecting it with what is known as the "Fuller Run tracks," a road about one mile long extending from the defendant's line to mines from which shipments had been made for a number of years, but which at this time seem to have been closed. From its mine No. 2 the complainant was ready to make shipments in April, 1903, but the siding, as it asserts, was spiked down by the defendant and kept in that condition for about nineteen months. Requests were made by the complainant from June 28 to July 31, 1903, for cars enough to ship 100 tons of coal per day from that mine. But no cars were furnished by the defendant until January 17, 1905, and then only after mandamus proceedings had been instituted in the coarts. The defendant's failure to supply cars for that mine, while supplying cars to other mines in the district, is one of the discriminations alleged in the complaint. What reason it had for refusing or failing to set cars there is not satisfactorily explained of record. But for some reason also not explained the complainant allowed the matter to rest in that condition for many months without taking any steps against the defendant and without even renewing its demand for cars so far as the record discloses. It is not clear, moreover, that the alleged closing of that siding by the defendant can fairly be regarded as a basis for a charge of discrimination; it has more the character of a tort or a wrongful violation of the defendant's general duty to the complainant as a common carrier for

which an appropriate action in the courts would doubtless lie to recover any damages thus sustained.

It is also asserted by the complainant that its mines were unfairly rated when compared with the ratings assigned to other mines in the same district and that as a result of this discrimination it suffered substantial losses. Although it appears that the capacity assigned in 1903 to certain of the mines of Williams & Company in the same mining district was greater than that established for the same mines in 1906 after a more accurate system of mine rating had been devised, the proof is not sufficiently clear to permit of a definite finding of a discrimination against the complainant in that respect. It does appear that prior to January 1, 1906, the rating assigned to mines in the nine coal-mining districts on the lines of the Pennsylvania were made, with the approval of the general superintendent, by division superintendents upon the general information of the latter officials, derived from observation and their general knowledge, and not upon any definite principle or plan for rating mines. The ratings, therefore, varied in accordance with the information and ideas of the different superintendents. We do not in fact understand the defendant to claim that there was any real system of mine rating in effect at that time. This lack of system was indeed characteristic of other large coal-carrying lines at that time, as is shown in the report of this Commission to the Senate and House of Representatives in the investigation to which reference has just been made.

The defendant meets this point by asserting that the real question to be determined is whether the complainant received less than its proper share of the cars distributed by the carrier during periods of scarcity of equipment and that it is not material that some other coal operator may have received more than his

quota of available cars. In other words, the contention is that so long as the complainant received all the cars it was entitled to it has no right to complain that some other coal shipper, as the result of a high mine rating or otherwise, secured an excessive proportion of the available cars, if this preference was not at the expense of the complainant. We must reject that view. The act to regulate commerce as amended not only gives a shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier, but gives him the assurance also that no one else shall fare ratably better than he does at the hands of the carrier. It may be true that a court would not allow the complainant damages for losses due to the defendant's failure to furnish it cars that it was not entitled to receive, but this Commission may surely require an interstate carrier to cease and desist from giving its competitor more cars than the competitor is entitled to receive.

But upon this part of the case the complainant's own witnesses do not sustain it to the full extent of its contentions, and we can only express the general impression that neither in its rating nor in its car supply did the complainant fare as well at the hands of the defendant as it possibly should have done. We find it impossible, however, to arrive at any clear or accurate statement of the extent of the discrimination. Williams & Company, its chief competitor in that district, received many more cars than the complainant and their mines enjoyed a higher capacity rating than was assigned to the mines of the complainant. They sold large quantities of coal to the defendant for use in its locomotives, and these cars were not counted against Williams & Company. While there was doubtless some discrimination in these matters, as there certainly was in the defendant's failure to count its own fuel cars against those mines, it is difficult, if not

impossible, to assign definite boundaries to it and to say at this time what should have been the rating of the respective mines and what should have been the proportion of each in the distribution of the defendant's coal-car equipment.

It is suggested that under its corporate charter, granted by the State of Pennsylvania, the defendant is not only a common carrier or transporting agency, but that its rails are at the same time a public highway, and it must therefore haul loaded or empty private cars for their owners upon reasonable terms. There is in its charter some language to that effect; and in *Boyle v. P. & R. Ry. Co.*, 54 Pa. St. Rep. 310, cited by counsel for the defendant on the argument, the Supreme Court of Pennsylvania held that a similar charter of another company in that state contemplated such a dual use of the road, by the company itself as a carrier in transporting the freight of shippers and by the owners of cars as a public highway substantially in the sense that a canal or turnpike is a public highway. Counsel, therefore, contends that the dual capacity in which the defendant is required to serve the public, as shippers and as car owners, necessarily eliminates from the case the argument that individual cars or private coal cars must be treated as railroad-system cars for purposes of allotment or distribution. It is urged that private cars may properly be counted against the mine owning them only in the manner and to the extent that the defendant's present rules take them into account in periods of car shortage.

Without entering upon any discussion of the extent to which the terms of a charter granted to a carrier by a state may control or limit the performance of its functions and obligations as an agency of interstate transportation, it will suffice to say that in none of its decisions relating to coal-car distribution has the Commission undertaken to forbid the use of private

cars by their owners, even though in a period of car shortage the number of cars owned by a mine may enable it to load daily more than the number of cars that it would receive if dependent solely on its share of system cars. On the contrary, the Commission has not only recognized the right of carriers to move private cars, but has insisted that the owners may not be deprived of the use of their individual cars and that such cars may not be thrown into the general pool of system cars and thus be diverted to the use of other operators. As the Commission has made no ruling that conflicts with the rights and obligations arising under the defendant's charter as construed by the state Supreme Court, we need not, and do not, here consider what the situation would be if the terms of its state charter required the defendant carrier in the distribution of its coal-car equipment to work an undue discrimination against an interstate shipper in violation of the act to regulate commerce as amended.

The petitioner in this complaint bases its claim for damages on the amount of coal that it might have mined, if the defendant had furnished it with a sufficient supply of cars to enable it to work its mines twenty days a month during the period covered by the complaint. It also claims that the cost of mining the coal actually taken out during the period in question was higher than it would have been had the defendant furnished it with an adequate supply of cars, thus enabling it to operate its mines to the best advantage by running them regularly and to their full capacity. In making up the amount of its claim the petitioner excepts a period of four months during 1906 when its miners were on a strike and takes the average selling price of coal during the remainder of the period covered by the action. It deducts as the cost of mining an amount per ton that is estimated as the probable cost had the defendant furnished the complainant with

rs enough to enable it to run its mines at full blast nd with the regularity that produces the best results. pon this general basis the complainant asserts that has been damaged as the result of the alleged dis- rimination against it by the defendant in the sum of 27,855.65, and for this amount it asks an award at he hands of the Commission.

The complaint herein was filed before our decision *Joiner v. P. R. R. Co.*, 17 I. C. C. Rep. 361, was an- ounced. In that proceeding damages were demanded or losses alleged to have been suffered in the decay f the complainant's fruit by reason of an alleged dis- rimination against him in favor of other dealers in ruit to whom the defendant, as the complainant con- nded, had given a preferred use of its unloading latform, thus delaying his shipments until the fruit as spoiled. We held, upon grounds that are there ully stated and need not be repeated here, that while he Commission was competent to find that a discrim- nation had been practiced, the measurement or ascer- ainment of the damages the complainant had suffered n consequence thereof was a judicial question for the ourts and not for the Commission; the view expressed as that the only damages that may be assessed by he Commission under the amended act were rate dam- ges or damages that could be measured by the differ- nce in the rate actually charged and the rate which, or any reason under the act, ought lawfully to have een charged; and that the complainant's remedy for he damages in compensation of the loss suffered in he value of his fruit was in the courts.

That case differs from this in that it involved a ingle wrong in the nature of a tort against a particu- ar shipper, while this case in its larger aspect involves he validity of a rule for car distribution applicable like to all coal shippers on the line of the defendant nd resulting, as we have pointed out, to the benefit of

some shippers and to the injury of others. We have found that in the particulars herein explained, discrimination was practiced, and have held that for such damages as resulted the complainant is entitled to recover from the defendant. As to whether we may go beyond the transportation question, the alleged discriminatory rules and practices, and enter upon an inquiry as to the amount of the damage that may have been suffered by the complainant, the Commission is divided as in the case to which we have just alluded. The majority is still of the opinion that it is not for us under the law to assess and determine the measure of the damages thus sustained by the complainant, that being a judicial question for the courts. At the most any finding by the Commission as to the amount of damages would be the expression of an opinion that could not be enforced by the Commission and would have no conclusive and binding effect upon the court to which, in any event, resort must be had by the complainant for a finding and judgment in the usual manner required by fundamental law. The minority, conceding some of the difficulties to be encountered in dealing with such matters, nevertheless interpret the law as necessarily casting that burden upon the Commission.

Since our decision in *Joynes v. P. R. R.*, *supra*, was announced, our attention has been called to an opinion by Judge McPherson of the United States District Court, sitting in the Circuit Court of the United States for the Eastern District of Pennsylvania, in *Morrisdale Coal Co. v. P. R. R. Co.*, 176 Fed. Rep. 748 (advance sheets of May 12, 1910). That was an action by the coal company against the defendant herein to recover damages in the sum of $250,000 for the sales and contracts that are alleged to have been lost because of the discrimination resulting from the same coal-car distribution rules that are involved in the proceeding now

before us. Citing *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio R. R. Co. v. U. S.*, 30 Sup. Ct. 164; and *Interstate Commerce Commission v. I. C. R. R. Co.*, 173 Fed. Rep. 930, Judge McPherson holds that the Commission and not the courts has primary jurisdiction to award reparation for the general damages of that character that may have resulted from a preferential practice in the distribution of coal cars during a percentage period. The case brings a new element into the situation. That is the court whose jurisdiction this complainant would doubtless invoke in order to secure pecuniary redress for the wrongs which the complainant claims to have suffered as the result of the discrimination we here find to have been practiced against it and others by the defendant. There is possibly no necessary conflict between the view there expressed and a refusal by the Commission to measure the complainant's damages in this case, after having found that a discrimination existed; but there is some danger, in view of the ruling of the court in that case, that justice may be defeated altogether in this case if we proceed no further with it. We have concluded therefore to order a further argument early in the fall with respect to the amount of damages suffered by the complainant in this proceeding, and by the petitioners in the other cases in this group of complaints, as the result of the discriminations that we find to have existed. Under all the circumstances, this seems the prudent course to pursue. The order of the trial court dismissing the action of the Morrisdale Coal Company, for want of jurisdiction, has been taken for review to the Circuit Court of Appeals; and if our further consideration of this group of cases results in awards of damages to the complainants and they resort to the courts for their enforcement, in case payment is contested by the defendants, the courts will then have the whole

question before them and some definitive interpretation of the act with respect to the extent of the authority of the Commission and the courts in this regard will follow, and this is highly desirable for the future guidance of both.

An order will be entered in accordance with these conclusions.

PROUTY, *Commissioner*, dissenting:

Although I am myself of the opinion that this case has been sufficiently talked about and sufficiently considered, and that it ought to be finally disposed of, still if the majority deems it necessary to hear further argument upon the question of damages, I do not dissent from that course. I do not agree with the holding of the majority that this Commission has no authority to assess and award these damages, and while it is not now proposed to make any order from which I dissent, I wish to express my views upon that subject. To my mind there is a clear distinction between the *Joynes case*, 17 I. C. C. Rep. 361, and the one before us.

Joynes was a fruit merchant located at Pittsburg, whose complaint was that the defendant had systematically delayed the movement and delivery of his traffic, in comparison with that of his competitors, whereby he had suffered serious damage. The act of the defendant was alleged to be in violation of the third section and the holding of the Commission was that, even if in violation of that section, damages could not be awarded by the Commission. No rate, regulation, or practice of the defendant was involved. The act complained of was personal to Joynes. While it seems to me that under the terms of the eighth and ninth sections of the act Joynes, in a case like that detailed, had a cause of action for the recovery of damages against the defendant which he might prosecute before this Commission, it also appears to me that he might

have brought his complaint in the first instance before the court. Had he begun such a suit it would not have been obnoxious to the objections sustained by the court in the *Abilene case*, 204 U. S. 426, or the *Pitcairn case*, 215 U. S. 481.

In the case before us this is different. Here is not a particular discrimination arising out of the conduct of the defendant toward a particular shipper, but rather a discrimination which inheres in a rule of the defendant applicable to all shippers and presumably enforced alike as to all shippers. While the courts might well be invested with exclusive jurisdiction to hear and determine suits like that of Joynes, it seems to me that in the case before us the Commission not only must, under the statute, but should, as a matter of convenience, award damages.

Sections 8 and 9 in my opinion give to the complainant a right of action for damages against the defendant and confer upon it the privilege of applying to this Commission for an order awarding those damages. It is impossible for me to put any other meaning upon the plain language of these sections, which read, so far as material to this question, as follows:

> "SEC. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

"SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

Here is a clear statement that in case of a violation of the act resulting in damages to any person the carrier shall be liable for such damages, and an equally explicit declaration that the recovery of such damages may be had either by a proceeding before the Commission or by suit in court; but that both remedies shall not be pursued for the recovery of the same damages.

The reasons of the majority for declining to exercise this jurisdiction, which is explicitly conferred by the ninth section, are stated in the *Joynes case*. It is there said in substance that damages resulting from a violation of the act may be divided into two classes, "rate" damages and "general" damages. By rate damages are meant those damages which can be ascertained by computation from a reference to the rates of the carriers only. The Commission determines what the reasonable rate ought to be; it determines what rate has been paid; the damages are the difference between the rate exacted and the rate which should have been exacted. These damages the Commission can and should award.

General damages may involve a consideration of all those elements which enter into the determination of damages in other cases. There is no exact measure by which such damages can be computed. To assess

them involves the consideration of evidence and the exercise of judgment. For the assessment of such damages this Commission has no greater qualification than a jury. Therefore, it is assumed that Congress, notwithstanding its express language to the contrary, did not intend to confer upon the Commission authority to deal with damages of that character.

In support of this somewhat novel canon for the interpretation of statutes the Commission refers to the action of the Supreme Court of the United States in the *Abilene case*, supra, in which that court held that, notwithstanding the language of the ninth section, by which a claimant is given an election between his suit in court and his proceeding before the Commission, nevertheless, in certain cases, the proceeding must be in the first instance before the Commission and can not be in court. Just as the Supreme Court in that case has read out of the ninth section the right to begin certain cases before the courts, so the Commission now proposes to read out of that same section the right to proceed in certain cases before the Commission.

I can find no case in which the Supreme Court of the United States has ever undertaken to qualify the express language of an enactment upon the ground adopted by this Commission in the *Joynes case*. That court has repeatedly said that courts have nothing to do with questions of expediency. Whether a statute is wise or unwise, whether it is expedient or inexpedient, whether the object aimed at is reached in the best way or not, are questions for the legislature not reviewable by the courts. The *Abilene case*, as I read it, not only fails to sustain the position of this Commission in declining to accept jurisdiction in matters like that before us, but, upon the contrary, plainly holds, both by necessary inference and by express language, that in a case like the one now under consideration the only tribunal in which complaint can be brought and

damages obtained is this Commission. If that be so, it is certainly the duty of the Commission, no matter how inconvenient the exercise of that function may be, to entertain the complaint, determine as best it can the damages, and award those damages by its order.

It should be clearly understood at the outset just what that violation of the act is of which complaint is made and for which damages are demanded.

It is true upon most coal-carrying roads, and was true upon the lines of the defendant during the period covered by this complaint, that in times of an active coal movement there are not sufficient cars to supply the demands of all mines. The amount of business which the miner can do depends upon the number of cars which he can obtain for the movement of his product. To furnish one mine with cars while they are denied to a competing mine means that the favored mine shall do business while the other stands idle. This renders preference in the furnishing of coal cars a most serious form of discrimination, and makes necessary the establishment of definite and uniform rules and regulations for the distribution of such cars to different operations during the period of car shortage.

The complainant alleges that the system under which the defendant distributed its coal cars was unlawful and discriminatory, in that certain classes of cars were furnished to mines in competition with it and not counted against the distributive quota of those mines, which resulted in the giving of more cars to its competitor than it was justly entitled to have. The allegation is not that the defendant made the complainant the object of any special act of discrimination. It did not unfairly apply its system of distribution in determining the number of cars to which the complainant was entitled, nor did it fail to deliver at the complainant's mine the cars to which it was entitled under

the scheme in force; but it applied a system or a practice which in its working out was unjust and discriminatory to the complainant.

The Commission finds that the method of distribution in force as to all shippers upon the lines of the defendant during the period covered by this complaint was unlawful and discriminatory and has directed the establishment of a different system for the future; but it declines to consider to what extent the complainant has been injured by the application of this practice, and to ascertain and award the damages which, confessedly, must have accrued.

To my mind there is no distinction between a practice of this kind and a rate. Every reason which requires the Commission to entertain claims of unreasonable rates and to award damages if the claim is sustained, requires with equal force that claims on account of discrimination by the application of general rules and practices of this character should be made in the first instance to the Commission and that damages should be awarded if the practice is found unlawful. If any distinction can be drawn between instances in which the Commission may and may not award damages for a violation of the act, that distinction should be founded, not upon the character of the damage, but upon the character of the act out of which the damage grows. If the thing alleged to be unlawful is a rate, regulation, or practice of general application which touches the entire shipping public alike, over which the Commission has control, with respect to which it must determine the reasonableness, and as to which it could order the substitution for the future of a different rate, regulation, or practice, then the proceeding for damages must be begun in the first instance before the Commission, and it is the duty of the Commission to ascertain and award the damages. This position is fully sustained by the recent decisions of the Supreme Court.

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, is familiar to all and only the briefest reference to it is needful.

The Cotton Oil Company claimed that certain rates imposed by the defendant for the transportation of cotton seed were excessive and brought suit in court to recover the amount of the excess. The transportation was interstate and the rates charged were those established under the provisions of the act to regulate commerce. The railroad defended upon the ground that a rate so established was conclusive upon all the world until changed by the Interstate Commerce Commission; that no suit could be brought either at common law or under the ninth section, but that the complainant must begin his proceeding by filing claim before the Commission.

This contention was sustained by the Supreme Court in a convincing opinion. Said the Court: The fundamental purpose of the act is to prevent preference and discrimination. For this purpose it is required that rates shall be established and notice given to the public in a certain specified manner and that the rate so established shall be collected of all shippers alike. If, now, suit can be brought for a recovery of a portion of this rate in the first instance, either in court or before the Commission, at the election of the shipper, it may follow that one jury will determine one rate to be reasonable, another jury a second rate to be reasonable, while the Commission may be of the opinion that still a third rate should be charged. This will of necessity produce the very discrimination which the act was intended to prevent. To give such a construction to the language of the ninth section would be to destroy the act itself.

It was held therefore in that case that the only remedy of a shipper for the payment of an excessive rate was to apply to the Commission, which, if it held

the rate to be excessive, should order the establishment of a reasonable rate for the future and award damages to the complainant upon the basis of the rate so established.

Let it be carefully observed that this conclusion was not reached because the Commission was an expert body, more competent to determine the reasonableness of a rate than a jury; nor because the rate was filed in its office and under its direction, and could, therefore, be more conveniently ascertained and applied; nor for any consideration of expediency or convenience, but because the opposite holding would accomplish the very thing which the act to regulate commerce was intended to prevent.

This further situation might arise: If a rate has been pronounced unreasonable by the Commission and reduced, or if a rate has been voluntarily reduced by the carrier without any action of the Commission, may a shipper, with respect to a time anterior to the action of the Commission or to the reduction of the rate, maintain a suit in court for the payment of the excessive rate?

Apparently, the same reasoning which leads to the conclusion that application must be first made to the Commission in case of an existing rate would lead to the same conclusion with reference to a rate no longer in effect, for if such suits could be brought in court it might follow that one shipper would in fact pay one rate and another shipper another rate. Such is the conclusion of the court, which, on page 442, says:

> ". . . Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless ex-

> tend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

And, again, on page 446, the following language is used:

> ". . . And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the statute to secure and on the other from enforcing that equality which the statute commands."

It appears, therefore, that whether the rate to be attacked is still in force or has been superseded by a lower or different rate, the complaint must be addressed in the first instance to the Commission, which is required to determine a reasonable rate and to award damages or reparation upon that basis. Whether, after the Commission has determined that a certain rate should have been charged during a given period, a shipper having paid the higher rate can begin suit in court in the first instance for the recovery of the excess, I express no opinion. It is evident that the discrimination complained of would not arise provided the rate fixed by the Commission could in any way be made conclusive in the suit instituted in court. However that may be, it is clearly the right of the shipper under all circumstances to file his claim with the Commission in pursuance of the provisions of the ninth section, and

is clearly the duty of the Commission, in the opinion f the Supreme Court, to entertain the claim, prosecute ne inquiry, *and award the reparation.*

I am unable to see any valid distinction between an xcessive rate and a rule or practice for the distribu- ion of coal cars like that involved in this proceeding. n each case the rate or regulation is of universal appli- ation. In either case to apply one rule to one shipper nd another rule to another shipper must result in reference. In each case the Commission has power o inquire whether the existing rate or regulation is awful and to prescribe another in substitution for the uture. No reason is urged by the court in the *Abilene ase* in justification of its holding there which would ot apply with equal force in support of a similar hold- ng here. That this must be so is no longer debatable ince the decision of the Supreme Court of the United States in *Interstate Commerce Commission v. I. C. R. R. Co.*, 215 U. S. 452, by which it was affirmed that he authority of this Commission over a regulation for he distribution of coal cars is exactly the same as its uthority over the rate of transportation itself.

The Illinois Central Railroad is a large carrier of oal and establishes, in common with other coal-carry- ng railroads, rules for the distribution of coal cars, n times of car shortage, between the different mines erved by it. Complaint was made to the Commission hat the method of distribution in force upon the Il- inois Central resulted in unjust discrimination against he complainant. There was no question as to the man- er in which the capacity of the mines was ascertained nd the percentage to which each mine was entitled letermined, but it was asserted that certain classes of ars were not counted against the assignments of the nines to which they were delivered. In alloting cars he Illinois Central, according to its regulations, did

not count private cars which were owned by the mine, foreign railway fuel cars which had been delivered to the Illinois Central by some other railroad for the purpose of being taken to a particular mine, and the fuel cars of that company itself which were used in transporting coal from the mine to the place where it was to be used by the railroad. The complainant contended that all these classes of cars should be counted against the assignment of the mine.

The Commission held with the complainant and made an order directing the Illinois Central to count all such cars in the future. That company conceiving this order to be unlawful petitioned to the Circuit Court for the Northern District of Illinois for an injunction against its execution. Upon hearing that court was of the opinion that the order of the Commission was correct as to private cars and foreign railway fuel cars, but incorrect as to company fuel cars, and an injunction was accordingly issued restraining the operation of the order as to such company fuel cars.

From this the Commission appealed to the Supreme Court of the United States, which reversed the decree of the Circuit Court and sustained the order of the Commission in full.

The contention before the Supreme Court was that the only order which the Commission could make under the fifteenth section was one prescribing a rate or a rule, regulation, or practice affecting a rate; that this regulation, while the effect of it might be to prevent discrimination, was not a regulation affecting rates and therefore not within the power of the Commission to make. The court held that a regulation of this kind was within the terms of the fifteenth section; that, therefore, the Commission might prescribe the rule which it did, and that such rule when prescribed would be binding upon the Illinois Central in its relations with all its coal mines.

This case determines that there is no distinction between an order of this Commission fixing the rate for the future and an order establishing a rule for the distribution of coal cars; and this being so, I am utterly unable to see any ground upon which a distinction can be made between the remedy which is open to the shipper for the recovery of damages in the two instances. If he must, in case of the excessive rate, apply to the Commission in the first instance, so in the case of the discriminating practice he must first make application to this body. To permit the institution of a suit in court until the rule has been fixed by the Commission would result in exactly the same discrimination and preference in case of the regulation touching the distribution of cars as it would in case of the excessive rate. It must follow as a necessary inference from this decision that courts are without jurisdiction to entertain in the first instance suits for damages resulting from the enforcement of improper rules for determining the capacity of its coal mines and the distribution of its coal cars in times of shortage between the different mines served. Any possible doubt upon this point has been laid at rest by the decision of the Supreme Court in *B. & O. R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, decided at the same time with the *Illinois Central case* just referred to.

The twenty-third section of the act gives a remedy through the district and circuit courts of the United States by mandamus in instances where a carrier is granting a preference in the movement of traffic or in the furnishing of cars or other facilities. The Pitcairn Coal Company, claiming that the Baltimore & Ohio Railroad was discriminating in favor of its competitor by the rules which it had established to govern the distribution of coal cars, began proceedings for mandamus against that company. It is not necessary to

detail the various specifications of preference set forth in that proceeding. The general system of car distribution in vogue on the Baltimore & Ohio was analogous to that established by the Illinois Central, and the grounds of complaint, while more numerous in this case than in that, had mainly to do with the failure to count different classes of cars.

After an elaborate hearing upon the facts the Circuit Court sustained the contention of the relator, the Pitcairn Coal Company, upon a single item, denying in the main the prayer for relief. Upon appeal by the Pitcairn Company, the Circuit Court of Appeals reversed the court below and held that the relator was entitled to the relief prayed for. The Supreme Court of the United States, upon appeal by the Baltimore & Ohio Company, decided that the Circuit Court had no jurisdiction under the twenty-third section, and that the suit should be dismissed. It placed its decision entirely upon the *Abilene case*, pointing out that there was no distinction between a rule or regulation of this character and a rate, and that therefore suit should have been begun in the first instance before the Commission.

It is therefore now determined beyond controversy that the complainant in the case before us could not at the time this complaint was filed have commenced in court, either at common law or under the twenty-third section, or under the ninth section, a suit at law for a correction of the discriminations complained of or the recovery of the damages incident upon those discriminating practices. It must have applied to this Commission. How, then, can this body consistently decline to exercise the jurisdiction which is plainly cast upon it by the statute as interpreted by the court of last resort and refuse to pass upon its claim for damages?

The opinion of the majority indicates that complaint may be made to the Commission, which will thereupon determine whether the regulation attacked is or has been in violation of law. If the Commission condemns the regulation, the complainant must then begin an independent suit in court for the recovery of his damages, upon the basis of the regulation approved by the Commission. The theory seems to be that the Commission has jurisdiction to prescribe the rule, but has no jurisdiction to award the damages which have resulted from failure to establish and observe a proper regulation in the past.

I express no opinion as to whether, if this Commission has definitely determined that a given rate or a given regulation for a definite period has been discriminatory or excessive and has prescribed the rate or regulation which will be reasonable or just, a shipper may or may not begin suit in court for damages based upon the rate established by the Commission. Such a rule would not be obnoxious to the objections found by the Supreme Court to the maintenance of the suits of the Abilene Cotton Oil Company and the Pitcairn Coal Company. It may be that such instances would present an opportunity for the alternative mentioned in the ninth section. I also think that a case like that of Joynes, where the act of the carrier is directed to a particular individual and does not consist of the enforcing against the public of a general rate, regulation, or practice, presents an instance where the party aggrieved may either sue in court or present his claim to the Commission. But this complainant must have begun before the Commission and the Commission should have jurisdiction to award the damages.

Upon what theory does the conclusion of the majority to the contrary rest? What is there in the language of the act which supports it? What is there in

the structure of the act which lends countenance to it? To my mind both the language and the theory of the statute are directly opposed to it.

Nothing can be plainer than that Congress intended to confer upon this body the authority and to lay upon it the duty to award damages for infractions of the act. This idea runs through the entire framework of the statute.

Section 9 provides that the person damaged may apply to the Commission or may bring suit in court, but shall not adopt both remedies for the same violation.

Section 13 provides that if the carrier "shall make reparation for the injury alleged to have been done, such carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of."

Section 14 provides that "in case damages are awarded such report shall include the findings of fact on which the award is made."

Section 16 declares that if the Commission shall determine that any party complainant is entitled to an award of damages it "*shall* make an order directing the carrier to pay to the complainant the sum to which he is entitled, on or before a day named." The same section fixes the period of time within which claims for damage shall be filed with the Commission and within which suits shall be begun in court to enforce the orders of the Commission awarding damages. That section also prescribes in detail the legal proceedings by which an award of damages may be enforced against the defendant.

Up to the time of the *Joynes case* it had been, as is pointed out by Commissioner Lane in his dissenting opinion in that case, 17 I. C. C. Rep. 361, the uniform practice of the Commission to award reparation in all cases where damages accrued from a violation of the act.

It is said that the Interstate Commerce Commission is an expert tribunal and that the assessment of damages is not within the range of its expertness; that it is an administrative body, and that the determination of damages is judicial and not administrative; all of which amounts to saying that the Commission is not qualified to deal with this question.

To this I am not prepared to assent. I can not admit this body is not as well qualified as a traverse jury to assess the damages of these complainants. For years we have investigated, in one form and another, in all its ramifications, the business of mining and selling coal. We understand, as no jury without that knowledge possible could, the effect of this discrimination upon the business of the coal operator. In my judgment the decision of the Commission would be more intelligent and less likely to be influenced by prejudice than that of a jury. But all this is entirely beside the mark; Congress, in set terms, has made it the duty of this Commission to award damages, and it is no concern of ours whether that provision of law is wise or unwise.

It is said that the Commission has no time to deal with such matters, and it certainly is true that its duties are various and exacting. But this, again, goes to the expediency, and that is not for our consideration; we can not decline to attempt to discharge the duties prescribed by the statute because it is inconvenient to do so.

The opinion of the majority holds that the complainant must first obtain from the Commission a finding that the regulation in effect has been discriminatory and determining what regulation ought to have been maintained; armed with this finding he may then bring suit in court for the recovery of his damages. It seems

to me that certain practical difficulties will be found in the application of such a rule, one of which is suggested by the present case.

The complaint asks damages from 1903 to the present time. The Hepburn Act provides that suits for the recovery of damages shall only be entertained by the Commission when filed with it within two years from the time the cause of action accrues, but it further provides that within a year from the passage of that statute complaints may be filed embracing all damages which had previously accrued. This complaint was seasonably filed to recover damages for the period named.

The complainant has diligently prosecuted its complaint, and now obtains a holding from the Commission that the regulation attacked is unlawful. If our order be made effective on June 1, 1910, it would follow that the complainant is then for the first time in position to maintain a suit in court.

But the order of the Commission fixing this regulation as to the distribution of coal cars is not of necessity final. It may be attacked in the courts by the railroad, and still another period of from one to three years may elapse before it is finally determined what regulations should have been in force during the period when these damages accrued.

What, now, is the rule to be applied as to the running of the statute of limitations? The usual period of limitation applicable to suits for the recovery of damages of this character is from three to six years. If the six-year period were to be applied the complainant has lost his damages for at least one year. Having seasonably begun his proceeding in the only forum in which it could be begun, and having prosecuted that proceeding with all diligence, he is, nevertheless, deprived of the right to the damages for a portion of the period.

It may be suggested that the filing of the complaint before the Commission may be regarded as the beginning of the suit which is subsequently brought in court. But there is no connection whatever between the proceeding before the Commission and the suit in court. All allegations as to damages for discrimination is immaterial and out of place before the Commission. And what of the competitors of the complainant who have suffered the same discrimination? Must these parties all file suits before the Commission to determine the regulation which ought to have been observed by the railway, although the determination in one case must of necessity control in all cases?

It may be said that a complainant should begin two proceedings, one before the Commission to determine the regulation or practice and another in court for the assessment of his damages, and that the suit in court should be continued until the Commission has prescribed the rule. But the statute explicitly declares that while the party injured may begin either before the court or the Commission he shall not begin in both places.

The seventh amendment to the Constitution of the United States provides that in suits at common law where the value in controversy exceeds $20 the right to trial by jury shall be preserved. The effect of this constitutional provision, if any, upon the question before us, is yet to be determined by the courts.

The original act to regulate commerce provided that an order for the payment of damages should be enforced by the court sitting as a court of equity. Under this state of the statute the Commission held that it could not award damages, where a determination of fact was necessary, for the reason that the parties would thereby be deprived of their right to a jury trial. For the purpose of removing this objection the

act was amended March 2, 1889, so as to provide that where suit was brought to enforce the Commission's order for damages either party might demand a jury trial. That the Commission understood that under the law as amended it could and should award damages appears from the following language, which occurs in the last case in which an award of reparation was refused upon this ground. *Rawson v. Newport News & Mississippi Valley Co.*, 3 I. C. C. Rep., 266, 279:

> As to the reparation claimed, prior to the amendment of the sixteenth section of the act to regulate commerce of March 2, 1889, we held in several cases, that as the statute provided for no trial by jury in the courts to enforce our awards in controversies such as were triable at common law and where more than $20 was involved, we could award no reparation in consequence of the provisions of the seventh amendment to the Constitution of the United States. The amendment of the statute of March 2, 1889, was made to cover this feature of the statute, but the amendment expressly provides that it shall have no reference to proceedings pending at the time the amendment was adopted; and this proceeding was pending at that time.

In my own view a proceeding to recover damages for failure of a railroad company to publish and maintain a certain rate of regulations is not a suit at common law within the meaning of the seventh amendment. The legislature may prescribe either by itself or through a commission the rate or regulation to be observed. Neither the shipper nor the carrier has any right at common law to a particular rate, nor need the reasonableness of the rate prescribed by the legislature be submitted to a jury. The legislature might undoubtedly enact that the published rate or regulation

should be binding upon all until changed. If now, it allows reparation with respect to the past it may do so upon condition that the amount shall be determined in a specified manner not involving a trial by jury.

The opinion of the majority makes no reference to the seventh amendment, nor do I see that the conclusion reached derives any support from that source, since that amendment must apply equally to the assessment of all kinds of damages. In awarding "rate" damages the Commission must determine the existence of certain facts, as the weight of the shipment, its character, the conditions of the billing, etc.; and these findings of fact may be conclusive upon the right of the complainant to recover. If such findings must be submitted to a jury in one class of cases they must in the other.

The delays and expenses of the law are proverbial. Especially is this true where the defendant is a railroad company with unlimited resources. It is notorious that shippers forego claims which they believe to be just rather than incur the cost and annoyance of attempting to enforce them by law.

One cardinal purpose of the act to regulate commerce was to provide a speedy and inexpensive method by which the shipper could obtain relief in such cases. My own observation is that, to an extent, this expectation of the framers of the act has been realized. The complainant does ordinarily obtain his order for damages with less delay and outlay than in court, and the railroad generally pays the award.

The complainant claims to have been damaged by more than $100,000 through the discrimination which we have found to exist, and its evidence tends strongly to support that claim. A material part of these damages never can be recovered unless awarded in this proceeding, and that through no fault of the complainant,

which seasonably began and has zealously prosecuted its complaint. Days have been spent in the taking of testimony; all the facts are before us, and I strongly feel that we should proceed to assess and order the payment of these damages.

The opinion of McPherson, Judge, in *Morrisdale Coal Co. v. P. R. R. Co.*, 176 Fed. Rep., 748, which has come to my attention since the foregoing matter was prepared, fully sustains the position taken.

There are two other points to which I wish to call attention.

This record indicates that at times the number of private cars delivered to certain mines has exceeded the quota of those mines. Even if private cars had been counted against the assignment of those mines, they would still have received more cars in proportion to their rating than the complainant.

In such case it seems to me that the railroad is guilty of discrimination, although it delivers to the mine only the cars which that mine owns. If, for example, a railroad only had sufficient cars for its own fuel supply the mine owner who did not sell coal to the company and who owned no cars himself, would obtain no cars whatever, while his competitor with an outfit of individual cars would be supplied. I do not think a railroad can lawfully devote its tracks and its motive power to the service of one mine, while declining to give to its competitor a similar service.

Probably, in the absence of contract provision thereto, a railroad would have no right to divert the cars of one mine to the use of another, but it might and should decline to put private cars into service except upon condition that there shall be no discrimination of this kind.

This may not be a matter of much importance in the present case. The use of private cars is growing

less, and the question will, in all probability, never be a living one. I do not, therefore, care to discuss it, but wish simply to note my position. In the matter of car distribution every car should, in my opinion, be treated as though owned by the railroad upon whose line it is in service.

The rule approved by the Commission for the rating of mines takes account both of physical capacity and commercial sales; and this, I think, is correct. When, however, the output has been limited by inability to obtain cars, and when that inability has been due to the discriminating practices of the defendant, it is evident that the application of this rule perpetuates at the outset the effect of the past discrimination. The complainant, owing to this discrimination, has not been able to sell as much coal, in comparison with its competitor, as it otherwise would, and therefore its rating upon this basis is not what it justly should be. For this reason it seems to me that it would be more just to begin upon the basis of physical capacity alone and subsequently introduce the factor of commercial sale, considering no sales which had been made under the discriminating rating.

LANE, *Commissioner*, also dissenting:

I am in full accord with that part of the Commission's report which condemns the existing car distribution rules of the Pennsylvania Railroad Company and prescribes the rules which shall be observed in the future, but I can not agree that the Pennsylvania Railroad Company's method of rating mines for purposes of car distribution is unobjectionable.

Under the recent decisions of the Supreme Court this Commission has been vested with what amounts to absolute authority over car distribution rules. Under an extension of the doctrine laid down in the *Abi-*

Lone Cotton Oil case it is now the law that a shipper does not have the right, before appealing to the Commission, to invoke the aid of a court of law in order to compel a carrier to furnish the transportation facilities to which the shipper believes he is entitled. It is further established that the courts will not inquire into the reasonableness of the rules prescribed by the Commission nor disturb the Commission's orders unless it appears that some constitutional guaranty has been violated or that the Commission has not proceeded in accordance with law. These decisions cast upon the Commission a responsibility as to railroad practices equal to that which rests upon it as to railroad rates. This body is made in the first instance the sole resort of the shipper; from our decision the shipper has no appeal, while the carrier's right of review is limited to questions of law. In the great majority of cases, therefore, our judgment must be a final determination of the questions involved. In view of this responsibility the decision in this case becomes of first importance.

Rules for the distribution of cars in periods of car shortage are of very recent invention, and it has appeared affirmatively in the cases which have been brought before this Commission, as well as in those before the courts, that the whole question of car distribution is in a state of flux; the carriers have not yet devised a code of rules which is satisfactory either to themselves or to their shippers. It is a matter of most general knowledge, brought out and clearly established in the coal investigation made by the Commission some three years since, that the distribution of cars to coal mines has been based largely upon interest, prejudice, and pull. There has been little, if any, pretense that cars were divided among coal mines upon a basis which the law could recognize as fair and nondiscriminatory. Since this investigation it appears that the carriers

have been making an honest effort to establish rules which would not be open to objection upon the ground of discrimination, but these rules are as yet but experimental—they do not represent the crystallized experience of years—at present they are but tentative. The preferences which have been shown to owners of private cars and to mines supplying railway fuel show clearly that the carriers are but feeling their way to a basis that will be more equitable than any hitherto obtaining. Instead, therefore, of regarding the rules involved in the cases recently reviewed by the Supreme Court as controlling this Commission, we are justified in saying no more upon this subject than that the views heretofore expressed are the result of such light and experience as we have been able to gain upon a most difficult subject, and are properly subject to amendment at any time. Moreover, it must be remembered that the Commission has not given its endorsement either to physical capacity or commercial capacity or to a blend of the two as a basis for the allotment of cars subject to distribution in a time of shortage.

As explained in the majority report, the Pennsylvania Railroad Company fixes the rating of a mine for purposes of car distribution by adding to the ascertained physical capacity the commercial output of the previous year and dividing the sum by two. I am not convinced that past commercial performance can be fairly taken as a measure of present-day needs. However, conceding that a mine's past shipments under normal conditions may properly be taken into account, it is clear that they do not afford an index of actual shipping capacity when they have been affected by numerous discriminatory practices. The undisputed testimony in this case shows that the complainant has been subjected to gross discrimination. The complainant was often compelled to go without cars for days at a time, while certain of its competitors had no difficulty

in securing an abundant car supply. The record further shows that the Pennsylvania Railroad Company spiked the switch leading to the mine of the Hillsdale Coal & Coke Company so that for nineteen months the complainant was unable to ship a ton of its output. This latter circumstance, according to the majority report, does not constitute unjust discrimination. If inequitable car distribution rules can be held discriminatory, and the Commission so finds, how can we look with greater benignity upon the absolute refusal of the defendant to serve one shipper while transportation facilities are freely accorded to his competitors? The indisposition of the majority to attach any importance to this phase of the complaint is inexplicable. In my opinion the spiking of the complainant's switch by the Pennsylvania Railroad Company constitutes unlawful discrimination in its most vicious aspect.

Be this as it may, the finding of the Commission is as follows:

> "Upon all the facts shown of record the Commission therefore finds that throughout the period of the action the system upon which the defendant distributed its available coal car equipment, including system fuel cars, foreign railway fuel cars, and individual or private cars, has subjected the complainant to an undue and an unlawful discrimination."

From this finding it necessarily follows that the output of the complainant's mines during the period in question does not fairly measure its normal commercial capacity. Its shipments have been arbitrarily and unjustly restricted by the operation of the unlawful rules of the defendant, and when this Commission permits the Pennsylvania Railroad Company to take that restricted commercial output as a factor in determining

the rating of the mine for purposes of car distribution, it is obvious that the past discrimination is being indefinitely perpetuated. This proposition seems so self-evident that it ought not to be necessary to support it by illustration. Let us take the case of a mine the physical capacity of which is 500 tons per day. By reason of the discriminatory practices of which it has been the victim its commercial output during the past year was restricted to 250 tons per day. A competitor, on the other hand, with the same physical capacity as well as the same business efficiency, was favored by the carrier and thereby enabled to market all the coal that it could produce during the preceding year. Under the rule which we are now considering the rated capacity of the mine which has been the victim of discrimination is some 375 tons per day, while that of the favored mine is 500 tons per day. Again, take the case of a mine whose switch was spiked so that it had no output whatever during the past year. Under the Pennsylvania Railroad Company's rule its present physical capacity of 500 tons is added to its past commercial capacity (zero) and the sum divided by two, the result being 250 tons, the rating of the mine for purposes of car distribution. Can there be any question that by sanctioning this rule we are permitting the defendant to prolong its discriminatory practices indefinitely? It would appear that this discrimination will be progressively diminished as the years go by, but this, I submit, does not temper the injustice of the rule.

The majority report commends the method employed by the Baltimore & Ohio Railroad Company in rating mines for purposes of car distribution. Under the Baltimore & Ohio rule the ascertained physical capacity is taken in conjunction with the commercial capacity during a period of free car supply in each of the

two preceding years, and the result divided by three. This method is even more objectionable than that of the Pennsylvania Railroad Company. In the first place it should be observed that we are considering rules for the distribution of cars during a period of car shortage. It is obviously unscientific, therefore, to look to a mine's output during a period of free car supply as an index of its probable needs during a period of car shortage. "A period of free car supply" necessarily connotes a season of slack demand. This means a period during which many of the weaker mines find it unprofitable to operate at all, whereas the operations which are more firmly established, and which perhaps have large contracts to fill occupy the field almost alone. On the other hand, a period of car shortage connotes a period when the demand for coal has been so increased that all the mines find it profitable to operate. In view of these considerations I regard it as indisputable that commercial output during a period of free car supply is not an equitable measure of probable output during a period of car shortage.

In the second place it should be remembered that the Baltimore & Ohio rule was expressly condemned by the Commission in its report following the coal and oil investigation in these words:

> "The effect of the system of car distribution in use upon the Baltimore & Ohio Railroad, and especially the method of ascertaining the percentage of cars to which each shipper is entitled by taking the output in the summer time, resulted in increasing the percentages of the large operators with which the Baltimore & Ohio Railroad Company was interested and in irregular and insufficient car service to the smaller operators who did not own 'individual cars' and who by lack of regular car service were unable to make satisfactory contracts for the sale of their output."

Consistency alone would seem to require a similar finding in the case now confronting us; but aside from that I feel that the facts developed in that investigation, as well as in other proceedings before this Commission, conclusively demonstrate the injustice of this rule. The Commission states, on page 59 of its Report on Discriminations and Monopolies in Coal and Oil:

> "During this period of remarkable growth in the coal tonnage on said road (the Baltimore & Ohio Railroad) the increase of its equipment and betterment of its roadway, some coal operators were compelled to dispose of their plants at a loss because they were unable to get cars; other persons, during the same period, desiring to become shippers, were subjected to serious discouragements, that being the policy of the road."

Citations need not be multiplied in order to make it clear that the past output of a mine under the conditions heretofore obtaining affords no criterion of its normal commercial capacity.

Perhaps the most serious fault in the Baltimore & Ohio rule is this: The element of commercial capacity, which may have been arbitrarily diminished by the unlawful conduct of the carrier, is allowed to count for twice as much as present physical capacity in fixing the mine's rating. This permits the carrier to accentuate and prolong past wrongs in a greater degree than the rule of the Pennsylvania Railroad Company. A rule which leads to such results is not susceptible of defense either upon legal or moral grounds.

We should not be unmindful of the fact that the rules we are considering are as unjust to a newly opened mine as to one which has been the victim of discriminatory practices. This is clearly pointed out by Judge Pritchard in his able opinion in the *Pitcairn Coal case*, 165 Fed. 130:

"Under the present method of ascertaining the percentage of cars to which the shipper is entitled, those shippers who are just beginning to develop their property are placed at a great disadvantage, and owing to which it is well-nigh impossible for a shipper thus situated to secure a sufficient allotment of cars as to enable him to dispose of the product of his mine in such quantities to secure anything like a substantial development of his property. Therefore we are of opinion that such system of coal mine rating is unfair and inequitable to new mines located along the line of this railroad company, where there are a number of old and established mines. To hold otherwise would be to give the Fairmont Coal Company and other favored companies an undue and unreasonable preference, which, as we have heretofore stated, is forbidden by the act, and we are therefore of opinion that the Court below erred in ruling that this particular method was a fair and reasonable one. We think the true rule as to the basis for the distribution of cars is correctly stated by Judge Goff in the case of *United States ex rel. Kingwood Coal Co. v. W. Va. No. R. R. Co., supra*, and that, in determining the percentage of cars to which each mine is entitled, the railroad company should be guided solely by the physical capacity of the mine to furnish coal for shipment."

In view of the injustice of the car distribution practices of the defendant and other coal-carrying railroads there is only one course properly open to the carrier at the present time. The ideal basis for the rating of mines is of course present-day commercial capacity. The difficulty lies in attaining that ideal. Physical capacity may not be a perfect standard, but at least it more nearly approaches the ideal than a rule which rests in part upon commercial output during a period when unlawful discrimination was the order of the day. I believe that it would not be unfair to compel the car

riers from this time forth to prorate their available equipment among the mines which they serve upon a physical capacity basis alone. This would enable all mines to start upon approximately even terms and would deny to mines which have been unduly favored in the past the right to retain the full measure of that unjust advantage. If, after having given the physical capacity basis a fair trial for a year, it should appear that it does not fairly represent commercial needs, proper amendments could readily be made. Past commercial performance would not then be such an inequitable factor as it today.

Commissioner CLEMENTS joins in this dissent.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of March, A. D. 1910.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,

} Commissioners.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted

by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainant and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required on or before the 1st day of October, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

And it is further ordered, That the question of the damages claimed by the complainant in this proceeding in respect of the matters and things in said report

found to be discriminatory be deferred pending further argument in the premises.

I, EDWARD A. MOSELEY, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled Report and Order of the Commission are true copies of the originals now on file in the office of this Commission.

Seal of Interstate Commerce Commission

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal of the Commission, this 24th day of September, 1910.

E. A. MOSELEY,
Secretary.

DEFENDANT'S EXHIBIT "C."

STATEMENT

Showing Cars Shipped from Scalp Level Region

From April, 1904, to November, 1905.

	Cars per month	*Cars per day*	*Total shipments*
1904			
April,	6102	235	305,123 net tons
May,	6228	240	311,412
June,	6070	233	303,495
July,	5580	223	278,986
August,	5450	202	272,511
September,	5744	221	287,183
October,	5963	229	298,168
November	6025	232	301,256
December,	4956	191	247,800
1905			
January,	4856	187	242,796
February,	2654	111	132,728
March,	4681	173	234,063
April,	5926	237	296,285
May,	7126	264	356,302
June,	6325	243	316,230
July,	5578	223	278,899
August,	5500	204	275,005
September,	6227	240	311,349
October,	6553	252	327,666

W. F. Jacoby & Company
v.
The Pennsylvania Railroad Company.

Philadelphia, Pa., Tuesday, November 25, 1919,
10 o'clock A. M.

Present: Parties as before noted.

CHARGE OF THE COURT.

Hon. J. Whitaker Thompson, *J.:*

Gentlemen of the Jury: In this case the plaintiff, Isaac C. Weber, as surviving partner of the co-partnership trading under the firm name of W. F. Jacoby & Company, is suing the Pennsylvania Railroad Company to recover damages alleged to have been suffered by the firm of which he was a member by reason of unlawful discrimination against the plaintiff's firm and in favor of other parties in the distribution of coal cars by the defendant company during the periods when there was a shortage of coal cars. You have heard the evidence in the case. The plaintiffs were, during the periods for which they claim damages, engaged in mining and shipping coal from what was known as Falcon Mine No. 2, which was in the Tyrone division of the Pennsylvania Railroad Company's system of coal car distribution. The plaintiffs claim that during the period from April 1, 1904, to the end of March, 1905, and during the second period, from April 1, 1905, to October 15, 1905, preferential practices or discriminatory practices in favor of other shippers were made in the distribution of coal cars. Under these facts the plaintiffs were entitled to and did bring under the Interstate Commerce Act a complaint before the Interstate Commerce Commission.

Under the proceedings regulated by the Act of Congress the proceedings may be instituted before the Interstate Commerce Commission where there is complaint that a practice of a railroad company, a common carrier, is unlawful or discriminatory. The Commission then proceeds to hear the parties and decides whether or not the practice or practices are discriminatory, and if they so find, they make an appropriate order. The plaintiff also has the right to claim before the Commission such damages as he has sustained, with a right to enforce any order made by the Commission in a Court. That is how this case got into this Court.

The plaintiffs in 1907 brought their action before the Interstate Commerce Commission, and after a hearing of both parties, and taking testimony, the Commission filed its report, which has been offered in evidence before you here. The basis of the complaint was, in the first place, on the fact that there was a shortage of coal cars. There were not sufficient coal cars to fulfill all the demands for shipping on the part of the Pennsylvania Railroad System in question. Of course, if there were ample cars to go around so that all shippers could get one hundred per cent., there would be no basis for the complaint that somebody got more than one hundred per cent. If the complaining shipper got his one hundred per cent. it would be no disadvantage to him, if he was shipping coal and had all the cars he needed, if somebody else got more than he needed. But at the time of shortage in cars the railroad companies make, and are justified in making, a plan for distribution of their cars among the shippers. That distribution is based on the rated capacity of the mine. The company takes, or is supposed to take, an average capacity of production of the various mines in the region, or on its system, add those rated capacities together of the different mines engaged in shipping,

and distribute the cars pro rata among those mines.

There appears to have been no dispute before the Commission that the plaintiff's mine was fairly rated at four hundred and fifty tons per day, during the days that they were in operation. In the first period, from April 1, 1904, to April 1, 1905, it appears that the plaintiff's mine was able to operate 275 days in the year, and during the second period 138¼ days. It appears from the findings of the Interstate Commerce Commission in their report as to discrimination that they found that there were certain discriminatory practices, and they stated in their opinion, or their report, which has been offered in evidence before you, what those discriminatory practices were. The principal ground of complaint was that in assigning cars, supplying cars to the plaintiffs, they were discriminated against because the railroad company, when it took the rated daily capacity of their mine or the rated capacity of other mines, deducted from the rated capacity of the mine, the number of private cars, cars owned by the mining company or operator, the cars assigned for carrying system fuel cars, that is, cars delivered to mines which had contracts with the Pennsylvania system for supplying them with fuel, and foreign railway fuel cars, that is, cars delivered for the purpose of supplying other railroads with their fuel supply. Those classes of cars were deducted from the rated capacity of the mine. For instance, if a mine had a rated capacity of 1000 tons a day, the foreign, private and system cars, railroad fuel cars, were deducted from the 1000 tons capacity. What the plaintiff contends was that instead of their being deducted from the 1000 tons rated capacity, in this illustrative case I speak of, they should be deducted from the distributive share in the case of coal shortage, which would be a very different thing. If there were only enough

cars to furnish thirty per cent. of the car capacity needed, the distributive share would be 300 cars, whereas the rated capacity was 1000 cars. So that the complaint was that these private cars and railroad fuel cars should have been deducted from the 300 distributive share instead of from the 1000, the rated capacity of the mine. The Commission found that that was an unlawful discrimination, and their report has been offered before you in evidence.

I will just briefly refer to the grounds on which the Commission found discrimination existed. The Commission says:

> "As we understand these cases, the substantial points upon which discrimination may be predicated are as follows:"

Then they go on to refer to the mines owned by other operators, and say:

> "It will suffice to mention only the six mines operated by or for the Berwind-White Coal Mining Company, one of which, known as Eureka No. 27, immediately joins the complainant's Falcon No. 2."

Then it refers to the fact that the same vein is worked in these two mines, and the quality of coal is about the same. Now they say, after having started with the substantial points upon which discrimination was predicated, as follows:

> "But neither Falcon No. 2 nor the mines of the complainant, the Clark Brothers Coal & Mining Company"—that is another complainant whose case was being heard at the same time—"was placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of the distribution of the defendant's available coal car equipment during the period of the actions.

"During the years 1902, 1903 and 1904 the employees of the defendant that were in charge of the distribution of coal car equipment had special orders for giving to the Berwind-White Coal Mining Company a special allotment of 500 cars daily. That company had contracts for supplying coal for certain steamships sailing from New York Harbor. Complaint had been made that these steamers were frequently delayed because of a lack of coal, and the defendant felt that it was warranted in making that special arrangement with the coal mines that had undertaken to supply them with fuel. This preference was the occasion of comment by the Commission in its report in the coal and oil investigation. Few, if any, of these specially assigned cars reached the Berwind-White mines in this particular mining district, and therefore it is difficult to determine to just what extent these complainants were prejudiced by that preference of a competing company's operations in another district; nevertheless, it was inequitable in principle and undoubtedly so to some extent at least in its results, and we see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference of one company and district and an undue discrimination against coal operations in another district."

The Commission then goes on to say:

"Another point also mentioned in our report in the coal and oil investigation just referred to is that 1000 of the defendant's own system coal cars were sold by the defendant to and were thus made available by the Berwind-White Company. The defendant to that extent diminished its capacity to supply the coal car requirements of other coal operations upon its lines. While the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will not be considered

in this report, the least that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interest of a particular company at the expense of its competitors.

I am not going to read the whole of the report, gentlemen, but I am just going to refer to the grounds on which the Commission found that the practices were discriminatory.

> "It is established with reasonable clearness on the record that the Berwind-White mines during the years 1906 and 1907, as well as to a period immediately preceding those dates, were daily in receipt of coal cars in large numbers and were therefore kept in operation almost continuously while the complainants received an inadequate supply and were not able, therefore, to run their mines to the best advantage. This difference is largely explained by the fact that the Berwind-White Coal Mining Company owned a large number of private cars and also enjoyed contracts for supplying the defendant and its connection with coal. Under the rules of defendant, fully explained in Hillsdale Coal and Coke Company v. P. R. R. Co., ante, the ownership of such private cars and the enjoyment of these contracts resulted in the special allotment to the mines of that company of these so-called assigned cars. For the reasons explained at some length in that case those rules operated as an undue discrimination against these complainants, and we so find."

Gentlemen, those are the grounds on which the Commission on March 7, 1910, held that the defendant company was discriminating in its distribution of cars against the plaintiff in that region. The plaintiff's cause of complaint was not only that the cars which were actually delivered into that region were inequitably and preferentially distributed as against it, but

by reason of withholding from this region, and distributing in other regions, 640 cars, as stated in the statement of claim, that the region as a whole did not get its full quota as against other regions, and by that practice the plaintiff was discriminated against.

In order to show discrimination in the case the plaintiffs have offered in evidence, and they offered in evidence before the Commission certain tabulated schedules or statements to show the proportion of cars distributed in that region to various shippers, and operators. Exhibit No. 10, which was offered in evidence before the Commission, and which is in evidence before you, shows that these favored shippers during the first period received cars equal in capacity to 59.9 of the aggregate of the mine's daily rating for 275 days, and in the period between April 1, 1905, and October 15, 1905, cars equal in capacity to 59.6 of the aggregates of their mine's daily rating for 138¼ days. The Commission, after having filed its preliminary report, or its report as to discrimination, proceeded later, after having afforded counsel the opportunity to argue it, to determine to what extent the plaintiffs had been damaged, and to award them damages.

Their report upon the question of damages was made on March 11, 1912. In that report they find damages in favor of Jacoby & Company, the plaintiffs in this case, to the extent of $21,094.39, with interest from June 28, 1907, which, I presume, is the time of the beginning of the proceedings before the Commission. In the report, after finding the rating of the mine at 450 tons per day, and the operating periods of the mine from April 1, 1904, to March 31, 1905, and from April 1, 1905, to October 18, 1905—after finding the operating periods in the first period, 275 days, and in the second period, 138¼ days, they then proceeded to ascertain two things: First, what the

damages were for the excess cost through lack of cars by reason of discrimination upon coal which was actually shipped; and, second, what they would have made in profits on the coal which would have been shipped if they had had their full quota of cars. They found that on the coal actually shipped, amounting to 38,700 and some tons in the first period and 17,900 and some tons in the second period, the loss by reason of the increased cost in the first period was 9.6 cents per ton, and in the second period 12.9 cents per ton. They also found that if the plaintiff had received its proper pro rata share of cars during the first period they would have shipped 35,415.2 tons additional, and in the second period 19,104.77 tons additional, and that the profit they would have made during the first period would have been 29.2 cents a ton, and in the second period 24.7 cents a ton, and by taking the figures computed by that, representing the loss on the coal actually shipped, and the loss of profits on what they would have shipped, if they had had cars, the Commission found that the complainants were damaged to the extent of $21,094.39.

It has been pointed out by the defendant's counsel that the relation which the coal which they actually shipped to the total amount which the Commission found they would have shipped is such that if you add the two together, and reduce them to carloads, the plaintiffs were being awarded damages on a basis of being entitled in the first period to 59.9 per cent. of their rated capacity, and in the second period to 59.6 per cent. of their rated capacity.

Those are the figures which, according to the tabulations introduced by the plaintiff, and which the Commission found, the favored shippers were getting.

The defendant contends, and it properly contends, that if the Commission based its finding on the proposi-

tion that the plaintiffs should have received cars equal to what the favored shippers got, that that was an erroneous theory on which to award them damages, because if the favored shippers were getting unlawfully more cars than they were entitled to, it does not follow, and of course it would be contrary to law, that the plaintiffs should also get more than they were entitled to so as to have a quota equal to that of the favored shippers.

The report of the Commission has been offered in evidence before you, gentlemen, and the law makes it prima facie evidence of the fact that the plaintiff has been damaged and the amount of damages which the Commission awards. "Prima facie evidence" means that if it is offered in evidence, and there is no testimony to contradict it, the jury are justified in taking it as sufficient evidence of the facts therein stated. I am speaking now of the report awarding damages. But the fact that it is prima facie evidence does not preclude it from attack, and the defendant has offered its evidence, and has argued to you, and you are instructed as a matter of law, that if the finding of the Commission was based on that percentage derived from those tabulations, and there is no other sufficient evidence before the Commission to establish these amounts, that the finding of the Commission was an erroneous one, and the jury are justified in disregarding the report of the Commission as evidence. It is a question for you gentlemen, therefore, to determine. There is other evidence before the Commission which you have a right to take into consideration. There is evidence to the effect that some of the mines in that district, which were not operating at certain times, were nevertheless receiving cars. There is evidence to the effect that operators who were not demanding cars were receiving cars, having cars alloted to them.

There is evidence to the effect, and it is so stated in the Commission's report, that the defendant's employees were instructed to make a distribution of at least 500 cars daily to the Berwind-White Coal Company. There is evidence based on the testimony of Mr. Hutchinson, General Manager of the Pennsylvania Railroad Company, to the effect that these 500 cars were distributed to other regions, and that additional cars were sold to the Berwind-White Company, amounting to 1000, and to another company amounting to 700, and to another company amounting to 500, aggregating 2200, which were distributed to another region.

Under this state of facts the plaintiff contends, and has offered evidence to show, that if those coal cars had been distributed properly it would have made a difference of 640 cars distributable to that Tyrone region, and they have offered evidence to show that it would have made a difference in distribution of 640 coal cars over the whole Pennsylvania system per day, which consists of, I think, nine or ten regions, and that the quota distributable to the Tyrone region would thereby have been increased 67 cars daily, or about that.

In determining whether the Commission had before it evidence upon which it could base a finding of damages of $21,094.39 against the defendant and in favor of the plaintiff you will take into consideration all of the testimony that was offered before the Commission, and you will also take into consideration in connection with the Commission's report in case you find it is sustained by any evidence on which the Commission could have found such a finding, or in which in your opinion such a conclusion would be reached, as a matter of fact, and you will take into consideration the other testimony which has been offered by the plaintiff in this case.

The plaintiff contends that the 67 additional daily cars would have been sufficient to have given the region cars to the full extent of their rated capacity, and the plaintiff would have gotten theirs. The plaintiff, however, is suing on the award of the Commission, and you would not be justified in the case in finding any damages in favor of the plaintiff in any greater amount than the Commission has awarded, and if you find that the evidence before the Commission is not sufficient on which to justify the finding which the Commission has made, then it would be for you to consider whether there is sufficient other evidence in the case which you independently can consider to sustain this award.

The Court, as a matter of law, instructs you that inasmuch as the basis of the plaintiff's suit is the award of the Commission, that if you find from the evidence that the amount of damages awarded by the Commission is not justified under the instructions I have given you, your verdict should be for the defendant. So that if you find for the plaintiff it must be because you find that there was sufficient evidence before the Commission on which to base its finding, and that finding was not based on the fact that the other shippers were getting during the first period 59.9 per cent. of the rated capacity and during the second period 59.6 per cent. of their rated capacity. It is for you to determine whether there is other evidence in the case which would justify the finding of the Commission of the amount which they have found in this case.

If you should find that the conclusion of the Interstate Commerce Commission that the plaintiff in the year ending April 1, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their mine's daily rating, and in the period between April 1 and October 18, 1905 cars equal in capacity to

59.6 per cent. of the aggregate of their mine's daily rating—if you should find that that conclusion was reached or arrived at because of the evidence presented by the plaintiff that the aggregate of the cars placed by the defendant at certain mines which had been selected for the purpose of comparison from those comprised in the region in which the plaintiff's mine was located, had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines, for the basis of the Commission's conclusion, then the award was an erroneous one, and under those circumstances the finding of the Commission would lose its effect as prima facie evidence, and you would only be justified in finding for the plaintiff if you find that from the other evidence offered before the commission, either of discrimination through distribution to favored shippers in the Tyrone region or through withholding cars from the Tyrone region, which should have been distributed there, the Commission was justified in arriving at that conclusion. If you find that the Commission was justified in arriving at that conclusion, or are satisfied from that evidence, and that evidence is reinforced by further evidence that the plaintiff has offered in the case, then you would be justified in finding a verdict in favor of the plaintiff, and assessing damages at the amount found by the Commission.

If, however, you should find that that was an erroneous finding, then it would be your duty to find to what extent the plaintiff was damaged, I mean in case you find that the plaintiff was actually damaged you would have to find to what extent the plaintiff was actually damaged. If you leave out the evidence before the Commission the Court is unable to say that there is any other evidence standing alone which would be sufficient, but the evidence which was before the Commission has all been offered before you, and some

additional testimony. The proper basis of damages in that case, if the Commission has not reached the proper basis, would be upon the theory set out in the Commission's report, but not based on a comparison between what the favored shippers received and what the plaintiff received.

If the plaintiff is entitled to recover and has suffered damages, the measure of damages would be the loss in operating, upon the coal that was actually shipped, through discrimination in favor of other shippers, together with the profits it would have made on the coal they would have been able to ship. The question as to what coal they would have been able to ship is a question for you gentlemen to decide under the evidence in this case. You have had the schedules laid before you, counsel have argued the case to you and explained the grounds on which they respectively base their demand on the one side and the defense on the other, and the questions of fact are for your determination. The defendant has offered in evidence, and has shown you these facts, in regard to the 59.9 per cent. and the 59.6 per cent., and as I have already instructed you, if you find the Commission's finding was based on that, then the Commission's finding as to the amount of damages suffered should not be considered by the jury, but the jury will be obliged independently, if they can do so, to arrive at a proper amount of damages.

If the jury do not believe that the plaintiff suffered any damages, or do not believe that they were discriminated against in favor of other shippers, either by the distribution of cars that were sent into this region or by the failure of the railroad company to send cars to the Tyrone region which should have been distributed there, then it would be your duty to find a verdict in favor of the defendant.

I have been asked by the defendant to charge you as to certain points. The defendant's first point is:

"1. To entitle the plaintiff to recover the evidence must have established that the partnership of Jacoby & Company did not receive during the period of the action the cars to which they were entitled under the rule of distribution prescribed by the Interstate Commerce Commission."

That point is affirmed.

The second point is declined upon the ground that it is based entirely on the cars actually placed in the Tyrone region.

The third point is declined for the same reason.

The fourth point is declined for the same reason.

The fifth point is declined upon the ground that it asks the Court to make a finding of fact, and also upon the ground that the matter of law therein referred to has already been set out in the charge to the jury.

The sixth point is declined.

The seventh point is declined.

The eighth point is declined.

The ninth point is covered in the charge so far as the Court considers it applicable to this case. It, therefore, is declined.

The tenth point is declined.

The eleventh point is declined, as it asks the Court to make a finding of fact which has been argued to the jury by counsel.

The twelfth point is declined.

The thirteenth point is declined.

The fourteenth point is affirmed.

"14. The plaintiff is not entitled to recover because the defendant failed to deliver to Jacoby & Company cars equal to the rated capacity of their mine even though Jacoby & Company could have used cars equal thereto. The plaintiff is only entitled to recover if it shall have established to the satisfaction of the jury that Jacoby & Company did not receive the number of cars which they were entitled to under the Commission's rule of distribution."

THE COURT: I will allow the defendant exceptions to the declining of the points, the second to the thirteenth inclusive.

(Exception noted for the defendant to declination of the defendant's second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth points, by direction of the Court.)

MR. GOWEN: I would like to take an exception because of the insufficiency of the charge in failing to call the attention of the jury to the fact that any order with respect to the delivery of the 500 cars to the Berwind-White Company was operative in any part of 1905, the Commission having found that those orders had been given in 1902, 1903 and 1904, there being no other evidence before the jury.

(Exception noted for the defendant as requested, by direction of the Court.)

MR. GLASGOW: Of course, the evidence that was before the Commission is now before the jury.

MR. GOWEN: There was no evidence before the Commission or the Court, either, of that.

MR. GOWEN: I would also ask for an exception to the failure of the Court to direct the attention of the jury to the testimony of Mr. Porcher that more than a year prior to that the sale was made of cars to the Berwind-White Company and the Keystone Company, and the cars thus sold had been replaced.

THE COURT: I will instruct the jury as to that.

MR. GOWEN: I also except to that part of your charge in which you stated to the jury that the law makes the report of the Commission prima facie evidence as to damages, as in our judgment of the law it is only prima facie evidence as to the findings of facts stated in it.

(Exception noted for the defendant as requested, by direction of the Court.)

MR. GOWEN: I also except to that portion of the charge which instructed the jury that they could consider evidence that idle mines had been receiving cars during the period of the action, there being no evidence either before the Commission or before the jury to that effect, and that cars were placed to mines which had not requested cars, there being no evidence to this effect before the jury, or before the Commission.

(Exception noted for the defendant as requested, by direction of the Court.)

MR. GOWEN: I also except to that portion of the charge in which the jury were instructed that in determining whether the Commission's finding would be sustained, they should consider the evidence as to the orders in favor of the Berwind-White Company for 500 cars, and as to the sales made to the Berwind-White, Keystone and the Ellsworth Companies.

(Exception noted for the defendant as requested, by direction of the Court.)

MR. GOWEN: I also except to the instruction to the jury that in determining whether the Commission's finding was correct, they could consider any evidence

before the Commission upon which the Commission could have reached such a conclusion, that the plaintiffs should have received cars equal to 59.9 per cent. in the first period and 59.6 in the second period of the action.

(Exception noted for the defendant as requested, by direction of the Court.)

MR. GLASGOW: I misled your Honor. I intended to call your attention to it when you charged. About the idle mines. That evidence was in the former trial, and I thought I had put it in here, but I had not.

THE COURT: I had the impression it was in here, too. I suppose I had been reading the testimony of the former trial.

MR. GLASGOW: Yes. I would ask your Honor to direct the jury as to that.

THE COURT: Gentlemen, counsel have called my attention to the fact that the Court inadvertently referred to testimony which was not in this case, and that is as to the deliveries by the railroad company of cars to idle mines, and I want to withdraw any impression that has been made upon you by the Court on that point, because it appears there is no such evidence offered before the jury, and you are not to consider that there was any such evidence, and you are not to base your findings at all on any such fact.

Counsel for the defendant has called my attention to the testimony offered by the defendant with relation to the order of distribution of 500 cars to the Berwind-White Coal Mining Company. It appears from the evidence that was offered by the defendant——

MR. GOWEN: No, in the Commission's finding.

MR. GLASGOW: But that ought to be taken in connection with Mr. Hutchinson's statement which was read here. That was during his administration, and his administration was continued during 1905.

MR. GOWEN: Mr. Hutchinson resigned as general manager in 1902.

THE COURT: In the finding of the Commission, then, these orders for the distribution of 500 cars to the Berwind-White Company were stated by the Commission to have been in effect during 1903, 1902, 1904, and therefore it is for you to determine whether the fact that they were in effect during those years would bear the inference that they continued to be in effect during the time covered by these complaints. Of course, it does not follow because they were in effect during those three years ending in 1904 that they continued to be in effect or that they affected in any way the distribution at this time.

The testimony also of Mr. Porcher should be called to your attention, which was in relation to the sale of cars to the Berwind-White Coal Company and to other people, to other shippers, which Mr. Porcher said was in 1902, in the fall or late summer of 1902, and he also has testified that that was followed by a replacement of that number of cars from the shops into the defendant's car supply. You will take that testimony into consideration in connection with what was before the Interstate Commerce Commission, and the testimony of Mr. Hutchinson, and if you find that this extra distribution to the Berwind-White Coal Mining Company and the sales of these cars to the Berwind-White Coal Mining Company and to other shippers did not affect the distribution in such a way as to favor some of the shippers during the period in question against others, particularly against the plaintiff, then you will not take that testimony as to those sales of cars or specially consigned cars into consideration at all. In that case there would be very little, if any, testimony left on which you could find any damages from discrimination.

MR. GLASGOW: I have no exceptions. May I hand to the jury a statement which I have prepared?

THE COURT: Yes.

The defendant's points which were refused by the Court without being read are as follows:

"2. It appears from the record of the proceedings before the Interstate Commerce Commission that in the period between April 1st, 1904, and April 1st, 1905, the aggregate rating of all mines in the Tyrone region, as shown by the distribution sheets of the defendant, amounted to 255,617 cars, and that the total number of cars of all classes placed at the mines in this region aggregated 77,430, or 30.3 per cent. of the aggregate region rating, and that in the period between April 1st, 1905, and October 18th, 1905, the aggregate rating of the mines in the Tyrone region amounted to 166,434 cars, and that the number of cars of all classes placed at these mines aggregated 49,834, or 29.9 per cent. of the aggregate region rating.

"If Jacoby & Company were entitled to share in the distribution of all the cars placed in the Tyrone region, they would have been entitled in the period between April 1st, 1904, and April 1st, 1905, to 28.6 per cent. of their mine's aggregate rating, and in the period between April 1st, 1905, and October 18th, 1905, to 30.1 per cent. of their mine's aggregate rating.

"3. It appears from the record of the proceedings before the Interstate Commerce Commission that the cars placed in the Tyrone region in the two periods, according to the distribution sheets of the defendant, comprised 25,474 fuel cars, so-called, and 33,539 private or individual cars, and under the rule of distribution prescribed by the Interstate Commerce Commission, Jacoby & Company were not entitled to have any of these cars placed at their mine, as they were not the

owners of any of the private or individual cars and were not supplying any fuel coal to either the defendant or other railroad companies during the period of the action.

"4. The only cars in the distribution of which Jacoby & Company were entitled to participate were the cars which were placed in the Tyrone region other than the fuel cars of the defendant and of other railroad companies and the private or individual cars of shippers. These distributable cars amounted in the period of the action to 53,454, less than 14 per cent. of the aggregate region rating of the mines in the Tyrone district.

"5. It has been mathematically demonstrated that the award of the Interstate Commerce Commission is based upon a finding by the Commission that Jacoby & Company in the year ending April 1st, 1905, should have received cars equal in capacity 59.9 per cent. of the aggregate of their mine's daily rating for 275 days, and in the period between April 1st, 1905, and October 18th, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their mine's daily rating for $138\frac{1}{4}$ days. There is nothing in the record of the proceedings before the Commission to justify or explain the percentages adopted by the Commission, except the evidence which is found therein, presented upon behalf of Jacoby & Company, to the effect that the aggregate of the cars placed by the defendant at certain mines in the Tyrone region which had been selected by Jacoby & Company for the purpose of comparison had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines. As the number of cars placed at these mines was not the standard by which to determine the number which should have been placed at the mine of Jacoby & Company, the basis for the Commission's award is an erroneous one, and the

plaintiff consequently is not entitled to recover the amount thereof.

"6. The record of the proceedings before the Interstate Commerce Commission contains no evidence from which the Commission could have ascertained the number of cars which Jacoby & Company should have received had the defendant delivered to them their share of the distributable cars ascertained in accordance with the Commission's rule of distribution, and the award, therefore, made by the Interstate Commerce Commission is not supported by the evidence adduced before it and should therefore be disregarded by the jury.

"7. No evidence has been presented which would enable the jury to determine whether Jacoby & Company, if the rule of distribution prescribed by the Commission had been followed by the defendant, would have received any greater number of cars than were allotted and delivered to them by the defendant, and there is no evidence, therefore, before the jury which would justify it in finding a verdict for the plaintiff."

"8. Under the law and the evidence the plaintiff is not entitled to recover, and your verdict should be for the defendant."

If the Court should decline to charge as requested in Points 7 or 8, then it is asked to charge the jury as follows:

"9. If the jury should find that the conclusion of the Interstate Commerce Commission, that Jacoby & Company in the year ending April 1, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their daily mine ratings, and in the period between April 1 and October 18, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiff that the ag-

gregate of the cars placed by the defendant at certain mines, selected for the purpose of comparison, from those comprised in the region in which Jacoby & Company's mine was located, had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiff is not entitled to recover."

"10. It appears from the reports of the Interstate Commerce Commission that the Commission declined to make an award to Jacoby & Company based upon sales of cars made by the defendant or the special orders directing the placing of 500 cars at the mines of the Berwind-White Company. The plaintiff cannot, therefore, recover because of these sales or these orders."

"11. The testimony has shown that following the sales of the cars made to the Berwind-White Coal Mining Company and to the Keystone Coal & Coke Company, concerning which testimony has been presented in this case, orders to replace those cars were given by the defendant, and that all of the cars thus ordered in replacement of those which had been sold were delivered to the defendant more than a year preceding the period of the present action. Those sales, therefore, afford no basis for a recovery in the present action, and they should consequently be disregarded by the jury."

"12. There is no evidence before you from which you can ascertain the number of cars, if any, which Jacoby & Company would have received during the period of the action in addition to those which were delivered by the defendant, had the defendant not

made the sales of its cars referred to in the reports of the Commission, and hence the plaintiff is not entitled to recover of those sales."

"13. There is no evidence before you from which you can ascertain the number of cars, if any, which Jacoby & Company would have received during the period of the action in addition to those which were delivered by the defendant, had the special orders for the placing of cars at the Berwind-White Company's mines not been given, and hence the plaintiff is not entitled to recover because of these special orders."

The jury returned a verdict in favor of the plaintiff for $36,787.45.

ORDER SEALING BILL OF EXCEPTIONS.

And thereupon, the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said Court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the record:

The said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge at the request of the said counsel for the defendant did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 17th day of March, 1920.

(Sgd.) J. W. THOMPSON, (L. S.)
J.

OPINION SUR MOTION FOR A NEW TRIAL.
(Filed March 8, 1920.)

THOMPSON, *J.:*

The jury rendered a verdict in favor of the plaintiff for $36,787.45. This is the equivalent of the award by the Commission of $21,094.39, principal, with interest at six per cent. from June 28, 1907, so that the question raised by the first reason for a new trial whether it is excessive depends upon whether there was sufficient legal evidence of damage before the Commission upon which to base its award. That question will be taken up in a discussion of other reasons.

As to the second, third and fourth reasons, the Court was asked in the second point for charge to make a computation of percentages based on the rating of mines and the cars placed at the mines and to instruct the jury as to such percentages. This is true also of the fourth point. The computation asked was the ascertainment of fact, not of law.

The second, third and fourth reasons are all based upon the plaintiff's contention that the only discrimination as to which the plaintiff could recover was in respect to distribution of cars actually placed in the Tyrone region. The plaintiff's case was not based upon that claim alone, for in their petition they charged discrimination not only as to illegal preferences in the distribution of cars actually distributed in the Tyrone division, but also discrimination through the arbitrary allotment of 640 cars per day to other divisions for the use of other mines in those divisions. Evidence in support of a claim of preference in allotment of cars to other divisions was given before the Interstate Commerce Commission to show that the defendant's employees received orders to give the Berwind-White Coal Mining Company a special allotment

of 500 cars daily, and of that the Commission in its report says:

> "It must be condemned in strong terms as an undue preference for one company and district and an undue discrimination against coal operations in another district."

Evidence was also offered before the Commission and read to the jury at the trial under objection to show sales by the defendant to the Berwind-White Coal Mining Company of 1000 of its own cars and to two other shippers of 700 and 500 respectively of its own cars, making a total of 2200 cars sold to shippers.

Certain testimony of Mr. Hutchinson, General Manager of defendant, given in the Coal and Oil Investigations, was offered before the Commission and read in evidence at the trial to show that the Pennsylvania system was thereby deprived of 140 cars per diem for general distribution. The 500 cars per diem arbitrarily allotted to Berwind-White Coal Mining Company and the 140 cars per diem referred to in Mr. Hutchinson's testimony made up the 640 cars per diem of which the plaintiffs claimed the Tyrone division was deprived and which were used preferentially in other divisions, and testimony was offered to show that the general distribution of those cars would have meant 67 cars per day for the Tyrone division in addition to those actually distributed in that division. As to the 1000 cars sold to the Berwind-White Coal Mining Company, the Commission found that the defendant to that extent had diminished its capacity to supply the coal car requirements of other coal operations upon its lines, and further stated that:

> "While the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will not be considered in this report, the least

that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors."

This report concludes:

"For the present and for the reasons there explained (in Hillsdale Coal & Coke Co. v. P. R. R. Co.) we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby."

The "several respects here mentioned" refer to the special allotment of 500 cars daily to the Berwind-White Coal Mining Company, the sale of the defendant's own system coal cars, and the distribution rules of the defendant resulting in not charging allotments to the Berwind-White Coal Mining Company of its private cars against its pro rata share. The report of the Commission contains a finding of the ultimate fact of discrimination as to the 500 cars daily allotted to the Berwind-White Coal Mining Company and distributed at its collieries on other disvisions, and that is sufficient to establish it as prima facie evidence for the jury. The facts and conclusions stated concerning sales of cars to shippers with the result that the defendant to that extent diminished its capacity to supply the coal car requirements of other coal operations upon its lines, and the finding that that indicated a desire on the part of the defendant to forward the interests of a particular company at the expense of its competitors was sufficient to go to the jury as prima facie evidence of discrimination, but the legal right to sell its cars to its customers was not passed upon. Its

effect as a discrimination, however, was stated as a fact.

> Meeker v. Lehigh Valley Railroad Company, 236 U. S. 412.

To have charged in accordance with the defendant's request as to points 2, 3 and 4, therefore, would have been taking from the jury all evidence of discrimination in preferring other divisions to the Tyrone division and would have confined the claim entirely to discrimination as to distribution of cars actually placed in the Tyrone division.

The fifth reason was based upon the refusal of a request containing in part language identical with that the refusal of which was held error when this case was before the Supreme Court (242 U. S. 89). In the form in which it was presented the Court was asked to state to the jury a mathematical demonstration and to instruct the jury that the mathematical demonstration had been adopted by the Commission and was erroneous, and that, therefore, the plaintiffs were not entitled to recover. When the case was before the Supreme Court, it was upon a record which did not contain certain testimony that had been before the Commission in relation to arbitrary allotments of cars nor the testimony of Mr. Hutchinson, General Manager of the defendant, taken in the Oil and Coal Investigations, and the plaintiffs relied entirely in their proof of damages upon what was contained in the reports of the Commission. In the present trial other evidence was introduced embodying not only the testimony taken before the Commission, but the testimony of witnesses to establish the preferential and discriminatory practices in relation to the special allotments of cars and the diversion to other divisions of the defendant's fuel cars sold to shippers. Under these circumstances, it was the duty of the Court to allow all competent evidence to go to the jury and to have them

determine the questions of fact, including the question as to whether there was any other evidence before the Commission to sustain an amount of damages coinciding with the amount which it would have awarded if Exhibit No. 10 had been the basis of their award. In the point the Court was requested to find the facts. The defendant, therefore, in my opinion, was not entitled to have the fifth point given to the jury.

The sixth point was an instruction that there was no evidence in the proceedings before the Commission of discrimination upon which the award could be based and the seventh that there was no evidence before the jury upon which an award for discrimination could be based. These two points left out of consideration entirely all the evidence in relation to preferential allotments to other divisions and to mines in the Tyrone division, and were, therefore, in my opinion, properly declined.

I see no ground upon which the case could have been taken from the jury as requested by the eighth point, the refusal of which is the subject of the eighth reason for a new trial.

The ninth point is identical with the eighth point presented at the former trial and which it was held by the Supreme Court upon the testimony produced at that trial should have been given in charge to the jury.

Exhibit No. 10, which was the subject of the point, was thoroughly discussed in the charge, and after discussing the bearing of that exhibit upon the finding of the Commission the jury were charged as follows:

> "The defendant contends, and it properly contends, that if the Commission based its finding on the proposition that the plaintiffs should have received cars equal to what the favored shippers got that that was an erroneous theory on which to award them damages, because if the favored shippers were getting unlawfully more cars than they

were entitled to, it does not follow, and of course it would be contrary to law, that the plaintiffs should also get more than they were entitled to so as to have a quota equal to that of the favored shippers."

After discussion of the prima facie effect of the report of the Commission, the charge proceeds:

"But the fact that it is prima facie evidence does not preclude it from attack, and the defendant has offered its evidence, and has argued to you, and you are instructed as a matter of law, that if the finding of the Commission was based on that percentage derived from those tabulations, and there is no other sufficient evidence before the Commission to establish these amounts, that the finding of the Commission was an erroneous one, and the jury are justified in disregarding the report of the Commission as evidence."

It was then pointed out to the jury that there was other evidence before the Commission which they had a right to take into consideration and after instruction that if they found for the plaintiffs it must be because they found there was sufficient evidence before the Commission upon which to base its finding, and that finding was not based on Exhibit No. 10, the jury were charged as follows:

"If you should find that the conclusion of the Interstate Commerce Commission that the plaintiff in the year ending April 1, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their mine's daily rating, and in the period between April 1, and October 18, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their mine's daily rating,—if you should find that that conclusion was reached or arrived at because of the evidence presented by the plaintiff that the aggregate of the cars placed by the defendant at certain mines which had been selected for the purpose of comparison from those comprised in the region in which the plaintiff's mine

was located, had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines, for the basis of the Commission's conclusion, then the award was an erroneous one, and under those circumstances the finding of the Commission would lose its effect as prima facie evidence, and you would only be justified in finding for the plaintiff if you find that from the other evidence offered before the Commission, either of discrimination through distribution to favored shippers in the Tyrone region, or through withholding cars from the Tyrone region, which should have been distributed there, the Commission was justified in arriving at that conclusion. If you find that the Commission was justified in arriving at that conclusion, or are satisfied from that evidence, and that evidence is reinforced by further evidence that the plaintiff has offered in the case, then you would be justified in finding a verdict in favor of the plaintiff, and assessing damages at the amount found by the Commission."

The jury were also instructed, which was in the defendant's favor, that their verdict should not exceed the amount of the damages found by the Commission. It was for the jury to find under the evidence whether the 640 cars distributed to other divisions or the 500 cars arbitrarily alloted to Berwind-White Coal Company, if distributed pro rata, would have brought the daily allotment up to a sufficient number of cars to show that the plaintiffs upon being deprived of their share suffered in damages to the extent found by the Commission. There was every endeavor at the trial to be guided by the opinion of the Supreme Court and to give the defendant the full benefit of its point in so far as it was applicable to the testimony presented at the present trial. If it had been given in charge to the jury as requested, it would have confined their consideration merely to the report of the Commission

and the testimony which was presented at the former trial. It would have taken away from their consideration all the additional evidence offered at the present trial.

In the tenth point, the subject of the tenth reason for a new trial, the Court was asked to charge the jury that the Commission had declined to make an award to the plaintiffs based upon sales of cars made by the defendant or the special orders directing the placing of 500 cars at the mines of the Berwind-White Company. This would have been in effect instructing the jury that the award was based upon Exhibit No. 10, rather than leaving it to find the fact. There is no statement in the report that the Commission so declined.

The eleventh point asked the Court to find as a fact and to instruct the jury as a matter of law that the sale of the defendant's cars was not a preferential or discriminatory act affecting the distribution of cars during the period in controversy and was, I think, properly declined.

The twelfth point, the subject of the twelfth reason, was declined because there was evidence from which calculation could be made showing what the plaintiffs would have received if the sales had not been made, and the same reason applies to the declining of the thirteenth point which is the subject of the thirteenth reason.

The fourteenth, fifteenth and sixteenth reasons are based on the charge that the verdict was against the evidence, the weight of the evidence and against the law, and, in my opinion, cannot be sustained as reasons for a new trial.

The seventeenth reason is based on the admission over the defendant's objection to Volume 8 of the testimony taken before the Interstate Commerce Commission in the Coal and Oil Investigation. This testimony was offered under the following circumstances: Mr. Jacoby, one of the plaintiffs, testified before the Inter-

state Commerce Commission, and the evidence was offered at the trial to show through testimony given by Mr. Hutchinson, General Manager of the Pennsylvania Railroad Company, in the Coal and Oil Investigation, that 2200 cars had been sold by the defendant to certain shippers and that the withdrawal of this number of cars from the company's service would mean the withdrawal of 140 cars per day from the system. Mr. Jacoby had read from an abstract of that testimony and it was admitted before the Commission without objection. I think, although the testimony was not in a judicial proceeding, that it was competent for the plaintiffs to introduce at the trial of this case to show upon what Mr. Jacoby's testimony before the Commission was based and as an admission by the defendant.

As to the eighteenth reason no ruling by any court has been called to my attention which holds that the amount of the award is not along with other facts prima facie evidence under Section 16 of the Interstate Commerce Act, which provides that the Commission shall make an order directing the carrier to pay to complainant the sum to which he is entitled and that in a suit based upon the Commission's order, the findings and order of the Commission shall be prima facie evidence of the facts therein stated. This reason is not urged by the plaintiffs in their brief nor was it made the subject of an exception.

As to the nineteenth reason, the instruction to the jury that there was evidence to the effect that some of the mines in the district, which were not operating at certain times, were nevertheless receiving cars, was erroneous and was corrected before the jury retired. The defendant contends that the Court erred in the same part of the charge in saying to the jury: "There is evidence to the effect that operators who were not demanding cars were receiving cars, having cars al-

lotted to them." I think this is harmless, inasmuch as it was followed by the explanatory statement: "There is evidence to the effect, and it is so stated in the Commission's report, that the defendant's employees were instructed to make a distribution of at least 500 cars daily to the Berwind-White Company," etc. I cannot see that there was harm done to the defendant by the statement that the operators who were receiving the allotted cars were getting them without demand, and it is apparent that the reference made was to the arbitrary allotment to the Berwind-White Company.

The twentieth, twenty-first and twenty-second reasons are, in my opinion, without merit.

As to the twenty-second reason, the question was left to the jury upon the ground that when it is once established that a condition or fact exists, it is presumed to continue for a reasonable time thereafter until the contrary is shown. There was nothing in the case to show that orders for car allotments were made annually so that it was for the jury to draw whatever inference was justified by the fact that the order was in effect in 1902, 1903 and 1904.

The motion for a new trial is denied.

PRAECIPE FOR JUDGMENT.

(Filed March 10, 1920.)

To the Clerk of the District Court of the United States for the Eastern District of Pennsylvania:

Enter judgment in favor of plaintiff and against defendant in the above-entitled cause, in the sum of $36,787.45, as per verdict of the jury.

WM. A. GLASGOW, JR.,
Attorney for Plaintiff.

JUDGMENT.
(Filed March 10, 1920.)

Before THOMPSON, *J.*

AND NOW, March 10, 1920, in accordance with praecipe filed, judgment on the verdict, in the above-entitled cause is hereby entered in favor of the plaintiff and against the defendant in the sum of thirty-six thousand seven hundred and eighty-seven and 45/100 dollars.

By THE COURT.

Attest:

E. G. JOHNSON,
Deputy Clerk.

PETITION FOR WRIT OF ERROR.
(Filed March 17, 1920.)

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

And now, the seventeenth day of March, 1920, comes the Pennsylvania Railroad Company, defendant herein, and says that on or about the tenth day of March, 1920, the said Court entered judgment in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignments of error filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Third Circuit for the correction of errors so complained of and for the re-

versal of the said judgment and that the transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

FRANCIS I. GOWEN,
Attorney for Defendant.

ORDER.

(Filed March 17, 1920.)

And now, March 17, 1920, upon motion of Francis I. Gowen, attorney for the defendant, and upon filing a petition for a writ of error and assignment of errors, it is ordered that a writ of error be, and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Third Circuit, the judgment heretofore entered herein, and the amount of bond on said writ of error be, and is hereby fixed in the sum of seventy-three thousand five hundred and seventy-four 90/100 dollars ($73,574.90).

By THE COURT,
J. W. THOMPSON,
J.

ASSIGNMENTS OF ERROR.

(Filed March 17, 1920.)

And now, the Pennsylvania Railroad Company, defendant in this cause, files with its petition for a writ of error the following assignments of error, upon which it will rely upon its appeal from the judgment in this court entered in this cause, and which appear in the record and proceedings in this cause:

1. The learned trial Judge erred in failing to set aside the verdict of the jury because excessive.

2. The learned trial Judge erred in refusing to affirm the second point submitted by the defendant, which point and the Court's answer thereto, were as follows:

> "2. It appears from the record of the proceedings before the Interstate Commerce Commission that in the period between April 1st, 1904, and April 1st, 1905, the aggregate rating of all mines in the Tyrone region, as shown by the distribution sheets of the defendant, amounted to 255,617 cars, and that the total number of cars of all classes placed at the mines in this region aggregated 77,430, or 30.3 per cent. of the aggregate region rating, and that in the period between April 1st, 1905, and October 18th, 1905, the aggregate rating of the mines in the Tyrone region amounted to 166,434 cars, and that the number of cars of all classes placed at these mines aggregated 49,834, or 29.9 per cent. of the aggregate region rating.
>
> "If Jacoby & Company were entitled to share in the distribution of all the cars placed in the Tyrone region, they would have been entitled in the period between April 1st, 1904, and April 1st, 1905, to 28.6 per cent. of their mine's aggregate rating, and in the period between April 1st, 1905, and October 18th, 1905, to 30.1 per cent. of their mine's aggregate rating.
>
> "The second point is declined upon the ground that it is based entirely on the cars actually placed in the Tyrone region."

3. The learned trial Judge erred in refusing to affirm the third point submitted by the defendant, which point and the Court's answer thereto were as follows:

> "3. It appears from the record of the proceedings before the Interstate Commerce Commission that the cars placed in the Tyrone region in the two periods, according to the distribution

sheets of the defendant, comprised 25,474 fuel cars, so-called, and 33,539 private or individual cars, and under the rule of distribution prescribed by the Interstate Commerce Commission Jacoby & Company were not entitled to have any of these cars placed at their mine, as they were not the owners of any of the private or individual cars and were not supplying any fuel coal to either the defendant or other railroad companies during the period of the action.

"The third point is declined for the same reason." [The Court's reference is to the reason for denying the second point.]

4. The learned trial Judge erred in refusing to affirm the fourth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"4. The only cars in the distribution of which Jacoby & Company were entitled to participate were the cars which were placed in the Tyrone region other than the fuel cars of the defendant and of other railroad companies and the private or individual cars of shippers. Those distributable cars amounted in the period of the action to 53,454, less than 14 per cent. of the aggregate region rating of the mines in the Tyrone district.

"The fourth point is declined for the same reason." [The Court's reference is to the reason for denying the second point.]

5. The learned trial Judge erred in refusing to affirm the fifth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"5. It has been mathematically demonstrated that the award of the Interstate Commerce Commission is based upon a finding by the Commission that Jacoby & Company in the year ending April 1, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their mine's daily rating for 275 days, and in the period between April 1, 1905, and October 18, 1905, cars

equal in capacity to 59.6 per cent. of the aggregate of their mine's daily rating for 138¼ days. There is nothing in the record of the proceedings before the Commission to justify or explain the percentages adopted by the Commission, except the evidence which is found therein, presented upon behalf of Jacoby & Company, to the effect that the aggregate of the cars placed by the defendant at certain mines in the Tyrone region which had been selected by Jacoby & Company for the purpose of comparison had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines. As the number of cars placed at these mines was not the standard by which to determine the number which should have been placed at the mine of Jacoby & Company, the basis for the Commission's award is an erroneous one, and the plaintiff consequently is not entitled to recover the amount thereof.

"The fifth point is declined upon the ground that it asks the Court to make a finding of fact, and also upon the ground that the matter of law therein referred to has already been set out in the charge to the jury."

6. The learned trial Judge erred in refusing to affirm the sixth point submitted by the defendant, which point and the Court's answer thereto, were as follows:

"6. The record of the proceedings before the Interstate Commerce Commission contains no evidence from which the Commission could have ascertained the number of cars which Jacoby & Company should have received had the defendant delivered to them their share of the distributable cars ascertained in accordance with the Commission's rule of distribution, and the award therefore, made by the Interstate Commerce Commission is not supported by the evidence adduced before it and should therefore be disregarded by the jury.

"The sixth point is declined."

7. The learned trial Judge erred in refusing to affirm the seventh point submitted by the defendant, which point and the Court's answer thereto were as follows:

"7. No evidence has been presented which would enable the jury to determine whether Jacoby & Company, if the rule of distribution prescribed by the Commission had been followed by the defendant, would have received any greater number of cars than were allotted and delivered to them by the defendant, and there is no evidence, therefore, before the jury which would justify it in finding a verdict for the plaintiff.

"The seventh point is declined."

8. The learned trial Judge erred in refusing to affirm the eighth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"8. Under the law and the evidence the plaintiff is not entitled to recover, and your verdict should be for the defendant.

"The eighth point is declined."

9. The learned trial Judged erred in refusing to affirm the ninth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"9. If the jury should find that the conclusion of the Interstate Commerce Commission, that Jacoby & Company in the year ending April 1, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their daily mine ratings, and in the period between April 1 and October 18, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiff that the aggregate of the

cars placed by the defendant at certain mines, selected for the purpose of comparison from those comprised in the region in which Jacoby & Company's mine was located, had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of those selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiff is not entitled to recover.

"The ninth point is covered in the charge so far as the Court considers it applicable to this case. It, therefore, is declined.

10. The learned trial Judge erred in refusing to affirm the tenth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"10. It appears from the reports of the Interstate Commerce Commission that the Commission declined to make an award to Jacoby & Company based upon sales of cars made by the defendant or the special orders directing the placing of 500 cars at the mines of the Berwind-White Company. The plaintiff cannot, therefore, recover because of these rules or these orders.

"The tenth point is declined."

11. The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, which point and the Court's answer thereto were as follows.

"11. The testimony has shown that following the sales of the cars made to the Berwind-White Coal Mining Company and to the Keystone Coal & Coke Company, concerning which testimony has been presented in this case, orders to replace those cars were given by the defendant, and that all of the cars thus ordered in replacement of those which had been sold were delivered to the defendant more than a year preceding the period of the

present action. Those sales, therefore, afford no basis for a recovery in the present action, and they should consequently be disregarded by the jury.

"The eleventh point is declined, as it asks the Court to make a finding of fact which has been argued to the jury by counsel."

12. The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"12. There is no evidence before you from which you can ascertain the number of cars, if any, which Jacoby & Company would have received during the period of the action in addition to those which were delivered by the defendant, had the defendant not made the sales of its cars referred to in the reports of the Commission, and hence the plaintiff is not entitled to recover [because] of those sales.

"The twelfth point is declined."

13. The learned trial Judge erred in refusing to affirm the thirteenth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"13. There is no evidence before you from which you can ascertain the number of cars, if any, which Jacoby & Company would have received during the period of the action in addition to those which were delivered by the defendant had the special orders for the placing of cars at the Berwind-White Company's mines not been given, and hence the plaintiff is not entitled to recover because of those special orders.

"The thirteenth point is declined."

14. The learned trial Judge erred in charging the jury as follows:

"There is other evidence before the Commission which you have a right to take into consideration. There is evidence to the effect that some of the mines in that district, which were not operating at certain times, were nevertheless receiving cars. There is evidence to the effect that operators who were not demanding cars were receiving cars, having cars allotted to them. There is evidence to the effect, and it is so stated in the Commission's report, that the defendant's employees were instructed to make a distribution of at least 500 cars daily to the Berwind-White Coal Company. There is evidence based on the testimony of Mr. Hutchinson, General Manager of the Pennsylvania Railroad Company, to the effect that these 500 cars were distributed to other regions, and that additional cars were sold to the Berwind-White Company, amounting to 1000, and to another company amounting to 700, and to another company amounting to 500, aggregating 2200, which were distributed to another region."

15. The learned trial Judge erred in charging the jury as follows:

"In determining whether the Commission had before it evidence upon which it could base a finding of damages of $21,094.39 against the defendant and in favor of the plaintiff, you will take into consideration all of the testimony that was offered before the Commission, and you will also take into consideration in connection with the Commission's report in case you find it is sustained by any evidence on which the Commission could have found such a finding, or in which in your opinion such a conclusion would be reached, as a matter of fact, and you will take into consideration the other testimony which has been offered by the plaintiff in this case."

16. The learned trial Judge erred in charging the jury as follows:

"So that if you find for the plaintiff it must be because you find that there was sufficient evidence before the Commission on which to base its finding, and that finding was not based on the fact that the other shippers were getting during the first period 59.9 per cent. of the rated capacity and during the second period 59.6 per cent. of their rated capacity. It is for you to determine whether there is other evidence in the case which would justify the finding of the Commission of the amount which they have found in this case."

17. The learned trial Judge erred in charging the jury as follows:

"In the finding of the Commission, then, those orders for the distribution of 500 cars to the Berwind-White Company were stated by the Commission to have been in effect during 1903, 1902, 1904, and therefore it is for you to determine whether the fact that they were in effect during those years would bear the inference that they continued to be in effect during the time covered by these complaints. Of course it does not follow because they were in effect during those three years ending in 1904 that they continued to be in effect or that they affected in any way the distribution at this time."

18. The learned trial Judge erred in authorizing the entry of judgment in favor of the plaintiff and against the defendant upon the verdict of the jury.

FRANCIS I. GOWEN,
Attorney for Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

(Filed March 23, 1920.)

To the Clerk of the District Court of the United States for the Eastern District of Pennsylvania:

In making up the transcript of record sur writ of error in the above-entitled case, will you please include the following papers:

Docket entries;
Writ of error;
Statement of claim;
Plea;
Bill of Exceptions;
Opinion denying motion for new trial;
Judgment;
Petition for writ of error;
Assignments of error;
Clerk's certificate.

(Sgd.) FRANCIS I. GOWEN,
Attorney for Defendant.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *sct.:*

I, GEORGE BRODBECK, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, *do hereby certify*, that the annexed and foregoing is a true and faithful copy of so much of the pleas and proceedings, in the case of Isaac C. Weber, surviving partner of W. F. Jacoby and Isaac C. Weber, co-partners trading under the firm name of W. F. Jacoby & Company, v. Pennsylvania Railroad Company, No. 2008, June Sessions, 1912, as per præcipe filed, a copy of which is hereto attached, the transcript of record in the above cause is to include, and now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the
(Seal) seal of the said District Court at Philadelphia, this 31st day of March in the year of our Lord one thousand, nine hundred and twenty and in the one hundred and 44th year of the Independence of the United States.

GEORGE BRODBECK,
Clerk District Court United States,
Eastern District of Pennsylvania.

In the United States Circuit Court of Appeals for the Third Circuit.

October Term, 1920.

No. 2568 (List No. 25).

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

ISAAC C. WEBER, Etc., Defendant in Error.

And afterwards, to wit, on the sixth day of October, 1920, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Hon. Victor B. Woolley, and Hon. J. Warren Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the tenth day of December, 1920, come the parties aforesaid, and the Court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit.

No. 2568.

ISAAC C. WEBER, Surviving Partner of W. F. Jacoby and Isaac C. Weber, Co-partners Trading under the firm Name of W. F. Jacoby & Company, Defendant in Error,

vs.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Buffington, Woolley, and Davis, Circuit Judges.

BUFFINGTON, *C. J.*:

This writ of error involves the correctness of the rulings and charge of the Court below on a second trial of the cause. We have had the benefit of full arguments by the able counsel concerned and after due consideration, we have reached the conclusion the Court below committed no error and its judgment should be affirmed. As all questions involved are stated and disposed of by the Court below in its

opinion* printed in full in the margin, refusing a new trial, and as it fully sets forth the facts and questions involved and sufficiently states reasons justifying the Court's action, we restrict ourselves to affirming the case on such opinion, simply noting these facts.

The suit was to recover an award of $21,094.39, being damages awarded the plaintiff by the Interstate Commerce Commission for

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*THOMPSON, *J.*:

The jury rendered a verdict in favor of the plaintiff for $36,787.45. This is the equivalent of the award by the Commission of $21,094.39, principal, with interest at six per cent from June 28, 1907, so that the question raised by the first reason for a new trial whether it is excessive depends upon whether there was sufficient legal evidence of damage before the Commission upon which to base its award. That question will be taken up in a discussion of other reasons.

As to the second, third and fourth reasons, the Court was asked in the second point for charge to make a computation of percentages based on the rating of mines and the cars placed at the mines and to instruct the jury as to such percentages. This is true also of the fourth point. The computation asked was the ascertainment of fact, not of law.

The second, third and fourth reasons are all based upon the plaintiff's contention that the only discrimination as to which the plaintiff could recover was in respect to distribution of cars actually placed in the Tyrone region. The plaintiff's case was not based upon that claim alone, for in their petition they charged discrimination not only as to illegal preferences in the distribution of cars actually distributed in the Tyrone division, but also discrimination through the arbitrary allotment of 640 cars per day to other divisions for the use of other mines in those divisions. Evidence in support of a claim of preference in allotment of cars to other divisions was given before the Interstate Commerce Commission to show that the defendant's employees received orders to give the Berwind-White Coal Mining Company a special allotment of 500 cars daily, and of that the Commission in its report says:

"It must be condemned in strong terms as an undue preference for one company and district and an undue discrimination against coal operations in another district."

Evidence was also offered before the Commission and read to the jury at the trial under objection to show sales by the defendant to the Berwind-White Coal Mining Company of 1,000 of its own cars and to two other shippers of 700 and 500 respectively of its own cars, making a total of 2,200 cars sold to shippers.

Certain testimony of Mr. Hutchinson, General Manager of defendant, given in the Coal and Oil Investigations, was offered before the Commission and read in evidence at the trial to show that the Pennsylvania system was thereby deprived of 140 cars per diem for general distribution. The 500 cars per diem arbitrarily allotted to Berwind-White Coal Mining Company and the 140 cars per diem referred to in Mr. Hutchinson's testimony made up the 640 cars per diem of which the plaintiffs claimed the Tyrone division was deprived and which were used preferentially in other divisions, and testimony was offered to show that the general distribution of those cars would have meant 67 cars per day for the Tyrone division in addition to those actually distributed in that division. As to the 1,000 cars sold to the Berwind-White Coal Mining Company, the Commission found that the defendant to that extent had diminished its capacity to supply the coal car requirements of other coal operations upon its lines, and further stated that:

"While the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will not be considered in this report, the least that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors."

alleged unlawful discrimination in car shipments. On the former trial, a verdict was rendered against the defendant for such award and interest. On entry of judgment thereon, a writ of error was sued out by the defendant to this Court. Thereupon, it being in doubt as to certain questions, certified the same to the Supreme Court for its opinion. That Court issued a certiorari to this Court which brought up the entire record, where the judgment of the Court below was

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This report concludes:

"For the present and for the reasons there explained (in Hillsdale Coal & Coke Co. v. P. R. R. Co.) we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby."

The "several respects here mentioned" refer to the special allotment of 500 cars daily to the Berwind-White Coal Mining Company, the sale of the defendant's own system coal cars, and the distribution rules of the defendant resulting in not charging allotments to the Berwind-White Coal Mining Company of its private cars against its pro rata share. The report of the Commission contains a finding of the ultimate fact of discrimination as to the 500 cars daily allotted to the Berwind-White Coal Mining Company and distributed at its collieries on other divisions, and that is sufficient to establish it as prima facie evidence for the jury. The facts and conclusions stated concerning sales of cars to shippers with the result that the defendant to that extent diminished its capacity to supply the coal car requirements of other coal operations upon its lines, and the finding that that indicated a desire on the part of the defendant to forward the interests of a particular company at the expense of its competitors was sufficient to go to the jury as prima facie evidence of discrimination, but the legal right to sell its cars to its customers was not passed upon. Its effect as a discrimination, however, was stated as a fact.

Meeker v. Lehigh Valley Railroad Company, 236 U. S., 412.

To have charged in accordance with the defendant's request as to points 2, 3 and 4, therefore, would have been taking from the jury all evidence of discrimination in preferring other divisions to the Tyrone division and would have confined the claims entirely to discrimination as to distribution of cars actually placed in the Tyrone division.

The fifth reason was based upon the refusal of a request containing in part language identical with that the refusal of which was held error when this case was before the Supreme Court (243 U. S. 89). In the form in which it was presented the Court was asked to state to the jury a mathematical demonstration and to instruct the jury that the mathematical demonstration had been adopted by the Commission and was erroneous, and that, therefore, the plaintiffs were not entitled to recover. When the case was before the Supreme Court, it was upon a record which did not contain certain testimony that had been before the Commission in relation to arbitrary allotments of cars nor the testimony of Mr. Hutchinson, General Manager of the defendant, taken in the Oil and Coal Investigations, and the plaintiffs relied entirely in their proof of damages upon what was contained in the reports of the Commission. In the present trial other evidence was introduced embodying not only the testimony taken before the Commission, but the testimony of witnesses to establish the preferential and discriminatory practices in relation to the special allotments of cars and the diversion to other divisions of the defendant's fuel cars sold to shippers. Under these circumstances, it was the duty of the Court to allow all competent evidence to go to the jury and to have them determine the questions of fact, including the question as to whether there was any other evidence before the Commission to sustain an amount of damages coinciding with the amount which it would have awarded if Exhibit No. 10 had been the basis of their award. In the point the Court was requested to find the facts. The

finally reversed in an opinion reported at 242 U. S., 99. In its opinion, the Supreme Court said:—

"It is urged that the testimony before the Commission is not all in the record, and that for aught that appears the Commission may have reached its conclusion and awarded damages upon other and competent proofs, and it is insisted that the co-incidence of the amount as awarded and the amount ascertained by the use of the

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defendant, therefore, in my opinion, was not entitled to have the fifth point given to the jury.

The sixth point was an instruction that there was no evidence in the proceedings before the Commission of discrimination upon which the award could be based and the seventh that there was no evidence before the jury upon which an award for discrimination could be based. These two points left out of consideration entirely all the evidence in relation to preferential allotments to other divisions and to mines in the Tyrone division, and were, therefore, in my opinion, properly declined.

I see no ground upon which the case could have been taken from the jury as requested by the eighth point, the refusal of which is the subject of the eighth reason for a new trial.

The ninth point is identical with the eighth point presented at the former trial and which it was held by the Supreme Court upon the testimony produced at that trial should have been given in charge to the jury.

Exhibit No. 10, which was the subject of the point, was thoroughly discussed in the charge, and after discussing the bearing of that exhibit upon the finding of the Commission the jury were charged as follows:

"The defendant contends, and it properly contends, that if the Commission based its finding on the proposition that the plaintiffs should have received cars equal to what the favored shippers got, that that was an erroneous theory on which to award them damages, because if the favored shippers were getting unlawfully more cars than they were entitled to, it does not follow, and of course it would be contrary to law, that the plaintiffs should also get more than they were entitled to so as to have a quota equal to that of the favored shippers."

After discussion of the prima facie effect of the report of the Commission, the charge proceeds:

"But the fact that it is prima facie evidence does not preclude it from attack, and the defendant has offered its evidence, and has argued to you, and you are instructed as a matter of law, that if the finding of the Commission was based on that percentage derived from those tabulations, and there is no other sufficient evidence before the Commission to establish these amounts, that the finding of the Commission was an erroneous one, and the jury are justified in disregarding the report of the Commission as evidence."

It was then pointed out to the jury that there was other evidence before the Commission which they had a right to take into consideration and after instruction that if they found for the plaintiffs it must be because they found there was sufficient evidence before the Commission upon which to base its finding, and that finding was not based on Exhibit No. 10, the jury were charged as follows:

"If you should find that the conclusion of the Interstate Commerce Commission that the plaintiff in the year ending April 1, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their mine's daily rating, and in the period between April 1, and October 18, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their mine's daily rating—if you should find that that conclusion was reached or arrived at because of the evidence presented by the plaintiff that the aggregate of the cars placed by the defendant at certain mines which had been selected for the purpose of comparison from those comprised in the region in which the plaintiff's mine was

percentages contained in the tables may not necessarily have controlled the action of the Commission. But it is difficult to reach the conclusion that the Commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentages shown in the tables, except by actually using them to ascertain the sum which is exactly the amount resulting from their application. The Commission might have approximated the same

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located, had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines, for the basis of the Commission's conclusion, then the award was an erroneous one, and under those circumstances the finding of the Commission would lose its effect as prima facie evidence, and you would only be justified in finding for the plaintiff if you find that from the other evidence offered before the Commission, either of discrimination through distribution to favored shippers in the Tyrone region, or through withholding cars from the Tyrone region, which should have been distributed there, the Commission was justified in arriving at that conclusion. If you find that the Commission was justified in arriving at that conclusion, or are satisfied from that evidence, and that evidence is reinforced by further evidence that the plaintiff has offered in the case, then you would be justified in finding a verdict in favor of the plaintiff, and assessing damages at the amount found by the Commission."

The jury were also instructed, which was in the defendant's favor, that their verdict should not exceed the amount of the damages found by the Commission. It was for the jury to find under the evidence whether the 640 cars distributed to other divisions or the 500 cars arbitrarily allotted to Berwind-White Coal Company, if distributed pro rata, would have brought the daily allotment up to a sufficient number of cars to show that the plaintiffs upon being deprived of their share suffered in damages to the extent found by the Commission. There was every endeavor at the trial to be guided by the opinion of the Supreme Court and to give the defendant the full benefit of its point in so far as it was applicable to the testimony presented at the present trial. If it had been given in charge to the jury as requested, it would have confined their consideration merely to the report of the Commission and the testimony which was presented at the former trial. It would have taken away from their consideration all the additional evidence offered at the present trial.

In the tenth point, the subject of the tenth reason for a new trial, the Court was asked to charge the jury that the Commission had declined to make an award to the plaintiffs based upon sales of cars made by the defendant or the special orders directing the placing of 500 cars at the mines of the Berwind-White Company. This would have been in effect instructing the jury that the award was based upon Exhibit No. 10, rather than leaving it to find the fact. There is no statement in the report that the Commission so declined.

The eleventh point asked the Court to find as a fact and to instruct the jury as a matter of law that the sale of the defendant's cars was not a preferential or discriminatory act affecting the distribution of cars during the period in controversy and was, I think, properly declined.

The twelfth point, the subject of the twelfth reason, was declined because there was evidence from which calculation could be made showing what the plaintiffs would have received if the sales had not been made, and the same reason applies to the declining of the thirteenth point which is the subject of the thirteenth reason.

The fourteenth, fifteenth and sixteenth reasons are based on the charge that the verdict was against the evidence, the weight of the evidence and against the law, and, in my opinion, cannot be sustained as reasons for a new trial.

The seventeenth reason is based on the admission over the defendant's objection to Volume 8 of the testimony taken before the Interstate Commerce Commission in the Coal and Oil Investigation. This testimony was offered under the following circumstances: Mr. Jacoby, one of the plaintiffs, testified before the Interstate Commerce Commission, and the evidence was offered at

result by using other and legal means to ascertain the damages sustained, but when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way. At least, we think that the testimony was in such shape that, as we have already said, the Company was entitled to the specific request upon this subject submitting the matter to the jury.

For error in refusing to give this request in the charge, the judgment of the District Court must be reversed, and the case remanded to that court for a new trial."

It will be noted that on this former trial the only evidence before the Court to support the award of the Commission was a certain car distribution sheet known as "Exhibit 10" which the Supreme Court, as stated in the extract quoted, held did not justify the award.

But on the present trial, the plaintiff produced certain testimony which, while it had given before the Commission in its proceeding,

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the trial to show through testimony given by Mr. Hutchinson, General Manager of the Pennsylvania Railroad Company, in the Coal and Oil Investigation, that 2,200 cars had been sold by the defendant to certain shippers and that the withdrawal of this number of cars from the company's service would mean the withdrawal of 140 cars per day from the system. Mr. Jacoby had read from an abstract of that testimony and it was admitted before the Commission without objection. I think, although the testimony was not in a judicial proceeding, that it was competent for the plaintiffs to introduce at the trial of this case to show upon what Mr. Jacoby's testimony before the Commission was based and as an admission by the defendant.

As to the eighteenth reason no ruling by any court has been called to my attention which holds that the amount of the award is not along with other facts prima facie evidence under Section 16 of the Interstate Commerce Act, which provides that the Commission shall make an order directing the carrier to pay to complainant the sum to which he is entitled and that in a suit based upon the Commission's order, the findings and order of the Commission shall be prima facie evidence of the facts therein stated. This reason is not urged by the plaintiffs in their brief nor was it made the subject of an exception.

As to the nineteenth reason, the instruction to the jury that there was evidence to the effect that some of the mines in the district, which were not operating at certain times, were nevertheless receiving cars, was erroneous and was corrected before the jury retired. The defendant contends that the Court erred in the same part of the charge in saying to the jury: "There is evidence to the effect that operators who were not demanding cars were receiving cars, having cars allotted to them." I think this is harmless, inasmuch as it was followed by the explanatory statement: "There is evidence, to the effect, and it is so stated in the Commission's report, that the defendant's employees were instructed to make a distribution of at least 500 cars daily to the Berwind-White Company," etc. I cannot see that there was harm done to the defendant by the statement that the operators who were receiving the allotted cars were getting them without demand, and it is apparent that the reference made was to the arbitrary allotment to the Berwind-White Company.

The twentieth, twenty-first and twenty-second reasons are, in my opinion, without merit.

As to the twenty-second reason, the question was left to the jury upon the ground that when it is once established that a condition or fact exists, it is presumed to continue for a reasonable time thereafter until the contrary is shown. There was nothing in the case to show that orders for car allotments were made annually so that it was for the jury to draw whatever inference was justified by the fact that the order was in effect in 1902, 1903 and 1904.

The motion for a new trial is denied."

had not been offered or considered by the Court in the former trial. He also furnished the testimony of witnesses on the stand whose testimony had likewise not been given in the former case. All this additional proof, the Court, on such second trial, submitted to the jury with instructions as to it and also to the insufficiency of "Exhibit 10" standing alone, to support the award, as follows:—

"The report of the Commission has been offered in evidence before you, gentlemen, and the law makes it prima facie evidence of the fact that the plaintiff has been damaged and the amount of damages which the Commission awards. 'Prima facie evidence' means that if it is offered in evidence, and there is no testimony to contradict it, the jury are satisfied in taking it as sufficient evidence of the facts therein stated. I am speaking now of the report awarding damages. But the fact that it is prima facie evidence does not preclude it from attack, and the defendant has offered its evidence, and has argued to you, and you are instructed as a matter of law, that if the finding of the Commission was based on that percentage derived from those tabulations, and there is no other sufficient evidence before the Commission to establish these amounts, that the finding of the Commission was an erroneous one, and the jury are justified in disregarding the report of the Commission as evidence. It is a question for you gentlemen, therefore, to determine. There is other evidence before the Commission which you have a right to take into consideration. There is evidence to the effect that some of the mines in that district, which were not operating at certain times, were nevertheless receiving cars. There is evidence to the effect that operators who were not demanding cars were receiving cars, having cars allotted to them. There is evidence to the effect, and it is so stated in the Commission's report, that the defendant's employees were instructed to make a distribution of at least five hundred cars daily to the Berwind-White Coal Company. There is evidence based on the testimony of Mr. Hutchinson, General Manager of the Pennsylvania Railroad Company, to the effect that these 500 cars were distributed to other regions, and that additional cars were sold to the Berwind-White Company, amounting to 1,000, and to another company amounting to 700, and to another company amounting to 500, aggregating 2,200, which were distributed to another region.

Under this state of facts the plaintiff contends, and has offered evidence to show, that if those coal cars had been distributed properly it would have made a difference of 640 cars distributable to that Tyrone region, and they have offered evidence to show that it would have made a difference in distribution of 640 coal cars over the whole Pennsylvania system per day, which consists of, I think, nine or ten regions, and that the quota distributable to the Tyrone region would thereby have been increased 67 cars daily, or about that.

In determining whether the Commission had before it evidence upon which it could base a finding of damages of $21,094.39 against the defendant and in favor of the plaintiff you will take into consideration all of the testimony that was offered before the Commission, and you will also take into consideration in connection

with the Commission's report in case you find it is sustained by any evidence on which the Commission could have found such a finding, or in which in your opinion such a conclusion would be reached, as a matter of fact, and you will take into consideration the other testimony which has been offered by the plaintiff in this case.

The plaintiff contends that the 67 additional daily cars would have been sufficient to have given the region cars to the full extent of their rated capacity,and the plaintiff would have gotten theirs,the plaintiff, however, is suing on the award of the Commission, and you would not be justified in the case in finding any damages in favor of the plaintiff in any greater amount than the Commission has awarded, and if you find that the evidence before the Commission is not sufficient on which to justify the finding which the Commission has made, then it would be for you to consider whether there is sufficient other evidence in the case which you independently can consider to sustain this award.

The court, as a matter of law, instructs you that inasmuch as the basis of the plaintiff's suit is the award of the Commission, that if you find from the evidence that the amount of damages awarded by the Commission is not justified under the instructions, I have given you, your verdict should be for the defendant. So that if you find for the plaintiff it must be because you find that there was sufficient evidence before the Commission on which to base its finding, and that finding was not based on the fact that the other shippers were getting during the first period 59.9 per cent. of the rated capacity and during the second period 59.6 per cent. of their rated capacity. It is for you to determine whether there is other evidence in the case which would justify the finding of the Commission of the amount which they have found in this case."

Was the Court in error in receiving such additional evidence on the second trial which the Supreme Court, be it observed, awarded? We see no other reason for which a new trial would have been so ordered than to afford an opportunity to the plaintiff to furnish additional testimony. Of this testimony, the trial Court said, in disposing of the motion for a new trial:

"In the present trial, other evidence was introduced embodying not only the testimony taken before the Commission, but the testimony of witnesses to establish the preferential and discriminatory practices in relation to the special allotments of cars and the diversion to other divisions of the defendant's fuel cars sold to shippers. Under these circumstances, it was the duty of the Court to allow all competent evidence to go to the jury and to have them determine the questions of fact, including the question as to whether there was any other evidence before the Commission to sustain an amount of damages coinciding with the amount which it would have awarded if Exhibit No. 10 had been the basis of their award."

On a review of the whole case, we are of opinion that on the second trial, the Court charged, as a matter of law, and gave full effect to what had been decided by the Supreme Court in reviewing the first trial and that upon the changed situation which arose in the second trial, it committed no error in receiving the new additional

testimony and submitting it to the jury as it did. The judgment below will therefore, as we have said, be affirmed.

Endorsements: 2568. Opinion of the Court by Buffington, J. Received & Filed Dec. 10, 1920. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit.

October Term, 1920.

No. 2568 (List No. 25).

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

ISAAC C. WEBER, etc., Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, December 10, 1920.

JOS. BUFFINGTON,
Circuit Judge.

Endorsements: 2568. Order Affirming Judgment. Received & Filed Dec. 10, 1920. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit.

October Term, 1920.

No. 2568.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

ISAAC C. WEBER, Surviving Partner of W. J. Jacoby and Isaac C. Weber, Co-partners Trading under the Firm Name of W. F. Jacoby & Company, Defendant in Error.

Specifications of Error.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Now comes the plaintiff in error, The Pennsylvania Railroad Company, by Francis I. Gowen, its Attorney, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Third Circuit in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to wit:

1. The said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania for thirty-six thousand seven hundred eighty-seven dollars and forty-five cents ($36,787.45), and costs of suit, entered on the 10th day of December, A. D. 1920, in favor of said defendant in error and against said plaintiff in error.

2. The said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court of the Eastern District of Pennsylvania and in not remanding the said cause to the said District Court for a new trial.

3. The said Circuit Court of Appeals erred in not sustaining the second assignment of error in the said cause, which assignment was as follows:

2. The learned trial Judge erred in refusing to affirm the second point submitted by the defendant, which point and the Court's answer thereto, were as follows:

"2. It appears from the record of the proceedings before the Interstate Commerce Commission that in the period between April 1st, 1904, and April 1st, 1905, the aggregate rating of all mines in the Tyrone Region, as shown by the distribution sheets of the defendant, amounted to 255,617 cars, and that the total number of cars of all classes placed at the mines in this region aggregated

77,430, or 30.3 per cent. of the aggregate region rating, and that in the period between April 1st, 1905, and October 18th, 1905, the aggregate rating of the mines in the Tyrone region amounted to 166,434 cars, and that the number of cars of all classes placed at these mines aggregated 49,834, or 29.9 per cent. of the aggregate region rating.

"If Jacoby & Company were entitled to share in the distribution of all the cars placed in the Tyrone region, they would have been entitled in the period between April 1st, 1904, and April 1st, 1905, to 28.6 per cent. of their mine's aggregate rating, and in the period between April 1st, 1905, and October 18th, 1905, to 30.1 per cent. of their mine's aggregate rating.

"The second point is declined upon the ground that it is based entirely on the cars actually placed in the Tyrone region."

4. The said Circuit Court of Appeals erred in not sustaining the third assignment of error in the said cause, which assignment was as follows:

3. The learned trial Judge erred in refusing to affirm the third point submitted by the defendant, which point and the Court's answer thereto were as follows:

"3. It appears from the record of the proceedings before the Interstate Commerce Commission that the cars placed in the Tyrone region in the two periods, according to the distribution sheets of the defendant, comprised 25,474 fuel cars, so-called, and 33,539 private or individual cars, and under the rule of distribution prescribed by the Interstate Commerce Commission Jacoby & Company were not entitled to have any of these cars placed at their mine, as they were not the owners of any of the private or individual cars and were not supplying any fuel coal to either the defendant or other railroad companies during the period of the action.

"The third point is declined for the same reason." (The Court's reference is to the reason for denying the second point).

5. The said Circuit Court of Appeals erred in not sustaining the fourth assignment of error in the said cause, which assignment was as follows:

4. The learned trial Judge erred in refusing to affirm the fourth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"4. The only cars in the distribution of which Jacoby & Company were entitled to participate were the cars which were placed in the Tyrone region other than the fuel cars of the defendant and of other railroad companies and the private or individual cars of shippers. These distributable cars amounted in the period of the action to 53,454, less than 14 per cent. of the aggregate region rating of the mines in the Tyrone district.

"The fourth point is declined for the same reason." (The Court's reference is to the reason for denying the second point).

6. The said Circuit Court of Appeals erred in not sustaining the fifth assignment of error in the said cause, which assignment was as follows:

5. The learned trial Judge erred in refusing to affirm the fifth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"5. It has been mathematically demonstrated that the award of the Interstate Commerce Commission is based upon a finding by the Commission that Jacoby & Company in the year ending April 1st, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their mine's daily rating for 275 days, and in the period between April 1, 1905, and October 18, 1905, cars equal in capacity of 59.6 per cent. of the aggregate of their mine's daily rating for 138 1/4 days. There is nothing in the record of the proceedings before the Commission to justify or explain the percentages adopted by the Commission, except the evidence which is found therein, presented upon behalf of Jacoby & Company, to the effect that the aggregate of the cars placed by the defendant at certain mines in the Tyrone region which had been selected by Jacoby & Company for the purpose of comparison had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines. As the number of cars placed at these mines was not the standard by which to determine the number which should have been placed at the mine of Jacoby & Company, the basis for the Commission's award is an erroneous one, and the plaintiff consequently is not entitled to recover the amount thereof.

"The fifth point is declined upon the ground that it asks the Court to make a finding of fact, and also upon the ground that the matter of law therein referred to has already been set out in the charge to the jury."

7. The said Circuit Court of Appeals erred in not sustaining the sixth assignment of error in the said cause, which assignment was as follows:

6. The learned trial Judge erred in refusing to affirm the sixth point submitted by the defendant, which point and the Court's answer thereto, were as follows:

"6. The record of the proceedings before the Interstate Commerce Commission contains no evidence from which the Commission could have ascertained the number of cars which Jacoby & Company should have received had the defendant delivered to them their share of the distributable cars ascertained in accordance with the Commission's rule of distribution, and the award, therefore, made by the Interstate Commerce Commission is not supported by the evidence adduced before it and should therefore be disregarded by the jury.

"The sixth point is declined."

8. The said Circuit Court of Appeals erred in not sustaining the seventh assignment of error in the said cause, which assignment was as follows:

7. The learned trial Judge erred in refusing to affirm the seventh point submitted by the defendant, which point and the Court's answer thereto were as follows:

"7. No evidence has been presented which would enable the jury to determine whether Jacoby & Company, if the rule of distribution prescribed by the Commission had been followed by the defendant, would have received any greater number of cars than were allotted and delivered to them by the defendant and there is no evidence, therefore, before the jury which would justify it in finding a verdict for the plaintiff.

"The seventh point is declined."

9. The said Circuit Court of Appeals erred in not sustaining the eighth assignment of error in the said cause, which assignment was as follows:

8. The learned trial Judge erred in refusing to affirm the eighth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"8. Under the law and the evidence the plaintiff is not entitled to recover, and your verdict should be for the defendant.

"The eighth point is declined."

10. The said Circuit Court of Appeals erred in not sustaining the ninth assignment of error in the said cause, which assignment was as follows:

9. The learned trial Judge erred in refusing to affirm the ninth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"9. If the jury should find that the conclusion of the Interstate Commerce Commission, that Jacoby & Company in the year ending April 1, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their daily mine ratings, and in the period between April 1 and October 18, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiff that the aggregate of the cars placed by the defendant at certain mines, selected for the purpose of comparison from those comprised in the region in which Jacoby & Company's mine was located, had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of those selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiff is not entitled to recover.

"The ninth point is covered in the charge so far as the Court considers it applicable to this case. It, therefore, is declined."

11. The said Circuit Court of Appeals erred in not sustaining the tenth assignment of error in the said cause, which assignment was as follows:

10. The learned trial Judge erred in refusing to affirm the tenth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"10. It appears from the reports of the Interstate Commerce Commission that the Commission declined to make an award to Jacoby & Company based upon sales of cars made by the defendant or the special orders directing the placing of 500 cars at the mines of the Berwind-White Company. The plaintiff cannot, therefore, recover because of these rules or these orders.

"The tenth point is declined."

12. The said Circuit Court of Appeals erred in not sustaining the eleventh assignment of error in the said cause, which assignment was as follows:

11. The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, which point and the Court's answer thereto were as follows:

"11. The testimony has shown that following the sales of the cars made to the Berwind-White Coal Mining Company and to the Keystone Coal & Coke Company concerning which testimony has been presented in this case, orders to replace those cars were given by the defendant, and that all of the cars thus ordered in replacement of those which had been sold were delivered to the defendant more than a year preceding the period of the present action. Those sales, therefore, afford no basis for a recovery in the present action, and they should consequently be disregarded by the jury.

"The eleventh point is declined, as it asks the Court to make a finding of fact which has been argued to the jury by counsel."

13. The said Circuit Court of Appeals erred in not sustaining the twelfth assignment of error in the said cause, which assignment was as follows:

12. The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"12. There is no evidence before you from which you can ascertain the number of cars, if any, which Jacoby & Company would have received during the period of the action in addition to those which were delivered by the defendant, had the defendant not made the sales of its cars referred to in the reports of the Commission, and hence the plaintiff is not entitled to recover (because) of those sales.

"The twelfth point is declined."

14. The said Circuit Court of Appeals erred in not sustaining the thirteenth assignment of error in the said cause, which assignment was as follows:

13. The learned trial Judge erred in refusing to affirm the thirteenth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"13. There is no evidence before you from which you can ascertain the number of cars, if any, which Jacoby & Company would have received during the period of the action in addition to those which were delivered by the defendant had the special orders for the placing of cars at the Berwind-White Company's mines not been given, and hence the plaintiff is not entitled to recover because of those special orders.

"The thirteenth point is declined."

15. The said Circuit Court of Appeals erred in not sustaining the fourteenth assignment of error in the said cause, which assignment was as follows:

14. The learned trial Judge erred in charging the jury as follows:

"There is other evidence before the Commission which you have a right to take into consideration. There is evidence to the effect that some of the mines in that district, which were not operating at certain times, were nevertheless receiving cars. There is evidence to the effect that operators who were not demanding cars were receiving cars, having cars allotted to them. There is evidence to the effect, and it is so stated in the Commission's report, that the defendant's employees were instructed to make a distribution of at least 500 cars daily to the Berwind-White Coal Company. There is evidence based on the testimony of Mr. Hutchinson, General Manager of the Pennsylvania Railroad Company, to the effect that these 500 cars were distributed to other regions, and that additional cars were sold to the Berwind-White Company, amounting to 1,000, and to another company amounting to 700, and to another company amounting to 500, aggregating 2,200, which were distributed to another region."

16. The said Circuit of Appeals erred in not sustaining the fifteenth assignment of error in the said cause, which assignment was as follows:

15. The learned trial Judge erred in charging the jury as follows:

"In determining whether the Commission had before it evidence upon which it could base a finding of damages of $21,094.39 against the defendant and in favor of the plaintiff, you will take into consideration all of the testimony that was offered before the Commission, and you will also take into consideration in connection with the Commission's report in case you find it is sustained by any evidence on which the Commission could have found such a finding, or in which in your opinion such a conclusion would be reached, as a matter of fact, and you will take into consideration the other testimony which has been offered by the plaintiff in this case."

17. The said Circuit Court of Appeals erred in not sustaining the
teenth assignment of error in the said cause, which assignment was
follows:

16. The learned trial Judge erred in charging the jury as follows:

"So that if you find for the plaintiff it must be because you find
at there was sufficient evidence before the Commission on which to
se its finding, and that finding was not based on the fact that the
ier shippers were getting during the first period 59.9 per cent. of
r rated capacity and during the second period 59.6 per cent. of
eir rated capacity. It is for you to determine whether there is
ier evidence in the case which would justify the finding of the
mmission of the amount which they have found in this case."

18. The said Circuit Court of Appeals erred in not sustaining the
enteenth assignment of error in the said cause, which assignment
s as follows:

17. The learned trial Judge erred in charging the jury as follows:

"In the finding of the Commission, then, those orders for the dis-
bution of 500 cars to the Bedwind-White Company were stated by
e Commission to have been in effect during 1903, 1902, 1904, and
erefore it is for you to determine whether the fact that they were
effect during those years would bear the inference that they con-
nued to be in effect during the time covered by these complaints.
course it does not follow because they were in effect during those
ree years ending in 1904 that they continued to be in effect or
at they affected in any way the distribution at this time."

19. The said Circuit Court of Appeals erred in not sustaining the
ghteenth assignment of error in the said cause, which assignment
s as follows:

18. The learned trial Judge erred in authorizing the entry of
dgment in favor of the plaintiff and against the defendant upon
e verdict of the jury.

Wherefore, the said, The Pennsylvania Railroad Company, plain-
f in error, prays that for the errors aforesaid and other errors
pearing in the record of said United States Circuit Court of
ppeals in the above entitled cause to the prejudice of the plaintiff
error the said judgment of the said United States Circuit Court of
ppeals be reversed, annulled, and for naught esteemed, and that
id cause be remanded to the United States District Court for the
astern District of Pennsylvania, with instructions to grant a new
ial in said cause, or for such further proceedings in said cause as
ay be determined upon by the Supreme Court, to the end that
stice may be done in the premises.

THE PENNSYLVANIA RAILROAD
COMPANY,

(Signed) By FRANCIS I. GOWEN,
Attorney for Plaintiff in Error.

December 27th, 1920.

Endorsements: 2568. Specifications of Error. Received & Filed Dec. 31, 1920. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit.

October Term 1920.

No. 2568.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

ISAAC C. WEBER, Surviving Partner of W. F. Jacoby and Isaac C. Weber, Co-partners Trading under the Firm Name of W. F. Jacoby & Company, Defendant in Error.

Petition for Writ of Error.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Your petitioner, The Pennsylvania Railroad Company, Plaintiff in Error, in the above entitled cause, respectfully shows that the above entitled cause is now pending in this Court, and that a judgment has therein been rendered on the 10th day of December, A. D. 1920, affirming a judgment of the District Court of the United States for the Eastern District of Pennsylvania in favor of the defendant in error and against the plaintiff in error, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and it is not an admiralty case, but that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; therefore your petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause directing the clerk of this Court to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the specification of errors herewith filed by said plaintiff in error may reviewed, and if error be found, corrected according to the laws and customs of the United States.

THE PENNSYLVANIA RAILROAD COMPANY.

(Signed) By FRANCIS I. GOWEN,
Its Attorney.

December 27, 1920.

1920, Dec. 31.

The above petition has been considered and the writ of error rayed for is allowed, subject to the appropriate bond.

VICTOR B. WOOLLEY, *C. J.*

Endorsements: No. 2568. Petition for writ of error and order llowing same. Received & filed Dec. 31, 1920. Saunders Lewis, r., Clerk.

Bond for Costs.

Know all men by these presents, That we, The Pennsylvania Rail-oad Company, as principal, and United States Guarantee Company, s sureties, are held and firmly bound unto Isaac C. Weber, survivng partner of W. F. Jacoby and Isaac C. Weber, co-partners tradng under the firm name of W. F. Jacoby & Company, hereinafter alled the Obligee, in the full and just sum of Two hundred and ifty dollars ($250.00) to be paid to the said Isaac C. Weber, survivng partner of W. F. Jacoby and Isaac C. Weber, co-partners trading nder the firm name of W. F. Jacoby & Company, his certain ttorney, executors, administrators, or assigns: to which payment ell and truly to be made, we bind ourselves, our heirs, executors nd administrators, jointly and severally, by these presents. Sealed ith our seals and dated this third day of January, in the year of our ord one thousand nine hundred and twenty one.

Whereas, lately at a session of the United States District Court for he Eastern District of Pennsylvania, in a suit depending in said ourt, between the said Isaac C. Weber, surviving partner of W. F. acoby and Isaac C. Weber, co-partners trading under the firm name f W. F. Jacoby & Company, and The Pennsylvania Railroad Comany, a judgment was rendered against the said The Pennsylvania ailroad Company and in favor of the said Isaac C. Weber, survivng partner of W. F. Jacoby and Isaac C. Weber, co-partners trading nder the firm name of W. F. Jacoby & Company, in the sum of 36,787.45, which judgment was on appeal to the United States ircuit Court of Appeals for the Third Circuit affirmed on the 10th day of December, 1920, and the said The Pennsylvania Railroad ompany having obtained a writ of error and filed a copy thereof in he Clerk's office of the said Court to reverse the judgment in the foresaid suit, and a citation directed to the said Isaac C. Weber, surviving partner of W. F. Jacoby and Isaac C. Weber, co-partners rading under the firm name of W. F. Jacoby & Company, citing and admonishing him to be and appear at the Supreme Court of the nited States to be holden at the city of Washington within thirty days.

Now the condition of the above obligation is such, that if the said The Pennsylvania Railroad Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea

good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

THE PENNSYLVANIA RAILROAD COMPANY, [Official Seal.]
By W. W. ATTERBURY, [SEAL.]
Vice President.

Attest:
J. TANEY WILLCOX, [SEAL.]
Asst. Secretary.

Approved by:

UNITED STATES GUARANTEE COMPANY, [Official Seal.]
WILLIAM H. JACKSON, [SEAL.]
Attorney in Fact.
EDWARD HHLE BAECKE, [SEAL.]
Attorney in Fact.

E. M. REED,
Witness as to Surety.

Endorsements: 2568. Bond on Appeal to Supreme Court. Received & filed Jan. 5, 1921. Saunders Lewis, Jr., Clerk.

Supersedeas Bond.

Know all men by these presents, That we, The Pennsylvania Railroad Company, as principal, and United States Guarantee Company, as sureties, are held and firmly bound unto Isaac C. Weber, surviving partner of W. F. Jacoby and Isaac C. Weber, co-partners trading under the firm name of W. F. Jacoby & Company, hereinafter called the Obligee, in the full and just sum of Seventy-three thousand five hundred seventy-four & 90/100 dollars, to the said Isaac C. Weber, surviving partner of W. F. Jacoby and Isaac C. Weber, co-partners trading under the firm name of W. F. Jacoby & Company, his certain attorney, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this eighth day of January in the year of our Lord one thousand nine hundred and twenty one.

Whereas, lately at a session of the United States District Court for the Eastern District of Pennsylvania, in a suit depending in said Court between the said Isaac C. Weber, surviving partner of W. F. Jacoby and Isaac C. Weber, co-partners trading under the firm name of W. F. Jacoby & Company, and The Pennsylvania Railroad Company, a judgment was rendered against the said The Pennsylvania Railroad Company and in favor of the said Isaac C. Weber, surviving partner of W. F. Jacoby and Isaac C. Weber, co-partners trading under the firm name of W. F. Jacoby & Company, in the sum

$36,787.45, which judgment was on appeal to the United States Circuit Court of Appeals for the Third Circuit affirmed on the 10th day of December, 1920, and the said The Pennsylvania Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Isaac C. Weber, surviving partner of W. F. Jacoby and Isaac C. Weber, co-partners trading under the firm name of W. F. Jacoby & Company, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at the city of Washington within thirty days.

Now the condition of the above obligation is such, that if the said The Pennsylvania Railroad Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

THE PENNSYLVANIA RAILROAD COMPANY, [Official Seal.]
By W. W. ATTERBURY, [SEAL.]
Vice-President.

Attest:
J. TANEY WILLCOX, [SEAL.]
Asst. Secretary.

Approved by:

UNITED STATES GUARANTEE COMPANY, [Official Seal.]
WILLIAM H. JACKSON, [SEAL.]
Attorney in Fact.
EDWARD H. DEBAECKE, [SEAL.]
Attorney in Fact.

E. M. REED,
Witness as to Surety.

Endorsements: 2568. Supersedeas bond on appeal to Supreme Court. Received & filed Jan. 8, 1921. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judical Circuit, sct:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original record and proceedings in this Court in the case of Pennsylvania Railroad Company Plaintiff in Error, vs. Isaac C. Weber, etc., Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this eighth day of January, in the year of our Lord one thousand nine hundred and

twenty-one and of the Independence of the United States the one hundred and forty-fifth.

[Seal of United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, Jr.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

UNITED STATES OF AMERICA, *ss:*

[Seal of United States Circuit Court of Appeals, Third Circuit.]

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between the Pennsylvania Railroad Company, and Isaac C. Weber, surviving partner of W. J. Jacoby and Isaac C. Weber, copartners trading under the firm name of W. J. Jacoby & Company, a manifest error hath happened, to the great damage of the said Pennsylvania Railroad Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighth day of January, in the year of our Lord one thousand nine hundred and twenty-one.

SAUNDERS LEWIS, Jr.,
Clerk U. S. C. C. A.

Allowed by:
JOS. BUFFINGTON,
Circuit Judge.

[Endorsed:] Writ of error.

UNITED STATES OF AMERICA, *ss:*

[Seal of United States Circuit Court of Appeals, Third Circuit.]

To Isaac C. Weber, surviving partner of W. J. Jacoby and Isaac C. Weber, co-partners trading under the firm name of W. F. Jacoby & Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court of Appeals for the Third Circuit, wherein the Pennsylvania Railroad Company is Plaintiff in Error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this eighth day of January, in the year of our Lord one thousand nine hundred and twenty-one.

JOS. BUFFINGTON,
Circuit Judge.

Service accepted.
WM. A. GLASGOW, JR.,
Attorney of Record for Defendant in Error.

Jan'y 8th, 1921.

[Endorsed:] Citation.

Endorsed on cover: File No. 28,063. U. S. Circuit Court Appeals, 3d Circuit. Term No. 706. Pennsylvania Railroad Company, plaintiff in error, vs. Isaac C. Weber, surviving partner of W. J. Jacoby and Isaac C. Weber, copartners trading under the firm name of W. F. Jacoby & Company. Filed January 27th, 1921. File No. 28,063.

[redacted]

No. 706.

OCTOBER TERM, 1918

IN THE

Supreme Court of the United States

THE PENNSYLVANIA RAILROAD COMPANY
Plaintiff in Error,

vs.

ISAAC C. WEBER, Surviving Partner of W. F. Jacoby and Isaac C. Weber, Co-Partners, trading under the firm name of W. F. Jacoby & Co., Defendants in Error.

ON WRIT OF ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION BY DEFENDANT IN ERROR TO ADVANCE

In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. 700.

Pennsylvania Railroad Company, Plaintiff in Error,

vs.

Isaac C. Weber, surviving partner of W. F. Jacoby and Isaac C. Weber, co-partners, trading under the firm name of W. F. Jacoby & Co., Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Now comes petitioner, Isaac C. Weber, surviving partner, defendant in error in the above cause, and respectfully moves that the above case be advanced for early hearing.

This cause was adjudicated in this Court on December 4th, 1916, upon the merits of the case as it then stood. Under the style of Pennsylvania Railroad Company against W. F. Jacoby & Co., reported in 242 U. S. p. 89.

The case was argued in this Court on October 20th, 1915, and affirmed by a divided Court on November 15th, 1915. Thereupon the case was restored to the docket for reargument on December 20th, 1915, was reargued on October 23d, 1916, and reversed on December 4th, 1916.

Thereafter, W. F. Jacoby departed this life and the cause was revived in the District Court of the United States for the Eastern District of Pennsylvania in the name of Isaac C. Weber, surviving partner of the firm of W. F. Jacoby & Co.

The cause was retried in the District Court of the United States, and judgment rendered for the plaintiff. A writ of error was taken by the defendant, Pennsylvania Railroad Company, to the Circuit Court of Appeals for the Third Circuit. The case was there argued and the judgment of the District Court was affirmed and thereupon this writ of error was sued out by the Pennsylvania Railroad and the case has now been docketed in this Court.

Petitioner shows that this case has been pending before the Interstate Commerce Commission and the Courts since 1896, and was adjudicated on December 4th, 1916, upon the merits as it then stood, and is now brought up again by writ of error.

The question involved is the right of the plaintiff in the District Court to recover the damages awarded to W. F. Jacoby & Co. by an order of the Interstate Commerce Commission as compensation for unjust discrimination of the Pennsylvania Railroad Company in the distribution of coal cars during the years 1904 and 1905.

Respectfully submitted,

ISAAC C. WEBER, Surviving Partner,
By
WM. A. GLASGOW, JR.,
Counsel for Defendant in Error.

MARCH 10th, 1921.

To the Pennsylvania Railroad Company, Plaintiff in Error:

Please take notice that on Monday, the 28th day of March, 1921, or as soon thereafter as counsel may be heard, the petitioner above mentioned, Isaac C. Weber, surviving partner, will move the Court in accordance with the foregoing written petition and motion to advance the above case on the docket for argument.

Respectfully,

ISAAC C. WEBER, Surviving Partner,
By

Wm. A. Gleason, Jr.
Counsel.

Legal service accepted.

Counsel for Plaintiff in Error.

No. ~~706.~~ 210

OCTOBER ~~TERM, 1921.~~

Office Supreme Court, U. S.
FILED
OCT 7 1921
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

vs.

ISAAC C. WEBER, Surviving Partner of W. F. Jacoby and Isaac C. Weber, Co-Partners, trading under the firm name of W. F. Jacoby & Co., Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PAPER BOOK UPON BEHALF OF PLAINTIFF IN ERROR.

HENRY WOLF BIKLÉ,
FREDERIC D. McKENNEY,
FRANCIS I. GOWEN,
For Plaintiff in Error.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. 706.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

Isaac C. Weber, Surviving Partner of W. F. Jacoby and Isaac C. Weber, Co-Partners, Trading under the Firm Name of W. F. Jacoby & Company, Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

STATEMENT OF THE CASE.

The present action was instituted to recover the amount of an award made by the Interstate Commerce Commission in favor of W. F. Jacoby & Co., who in the period between April 1st, 1904, and October 15th, 1905, had been the owners and operators of a coal mine known as "Falcon No. 2," which was located upon, and which shipped by, the railroad of the plaintiff in error.

In this period the plaintiff in error had made a pro rata

or percentage distribution of its cars among the mines located on its railroad, this being necessary because the aggregate shipping capacity of the mines exceeded the capacity of the cars available for shipments therefrom.

Jacoby & Co., conceiving that they had not received the number of cars which they were entitled to, instituted a proceeding before the Interstate Commerce Commission in July, 1907, which eventuated in the award upon which the present action is based.

In this proceeding the Commission determined what should have been the system or method of car distribution which the plaintiff in error should have pursued in the period of the action, and then undertook to ascertain whether Jacoby & Co. had received all the cars which they would have received had the approved system been in force during the period of the action.

For the purpose of enabling it to make allotment and distribution of its cars, the plaintiff in error had rated all the mines shipping by its lines under a system which was designed to determine as accurately as practicable the relative shipping capacity of each mine.

The Commission found that the rating which had been given to Jacoby & Co's. mine, viz., 450 tons per day, was a fair one, and that the mine could have worked, having regard to conditions which prevent a mine from working steadily, in the period between April 1st, 1904, and April 1st, 1905, 275 days, and in the period between April 1st, 1905, and October 15th, 1905, 138¼ days.

The Commission did not embody either in its reports or orders any findings as to the number of cars which the plaintiff in error had available for distribution among shippers in the period of the action, nor as to the proportion of the available cars which should have been delivered to Jacoby & Co., but did embody in one of its reports the following findings:—

> "That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the

complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods."

If Jacoby & Co. had received cars sufficient to have enabled them to ship the additional amounts of coal in the two periods which the Commission found they ought to have been enabled to ship, the aggregate of their shipments would have been in the earlier period 74,126.25 tons, and in the later period 37,078.65 tons, or 59.9 per cent. and 59.6 per cent., respectively, of the aggregate ratings of their mine for the two periods into which the Commission divided the period of the action, the aggregate ratings being ascertained by multiplying the daily rating of 450 tons by the number of days which the Commission found the mine would probably have worked in the two periods, viz., 275 and 138¼ days, respectively.

While the Commission did not indicate how it had reached the conclusion that in the earlier period Jacoby & Co. should have received cars equal to 59.9 per cent. and in the later period to 59.6 per cent. of their mine's rating, the bases of these percentages is clearly deducible from certain evidence presented by Jacoby & Co. in the proceeding before the Commission upon which they relied to establish their claim of discrimination. This evidence consisted of two exhibits which will be found at pages 260 and 261 of the Transcript of Record.

It appears from these exhibits that certain operators in the region in which the mine of Jacoby & Co. was located, known as the Tyrone Region, had received in the aggregate in the two periods into which the Commission divided the period covered by the claim of Jacoby & Co., cars equal in capacity to 59.9 per cent. and 59.6 per cent., respectively, of the aggregate capacity of their mines. The percentages which these mines received, therefore, accorded exactly with the percentages which the Commission found Jacoby & Co. should have received.

It was established through the testimony of William F.

Jacoby (Transcript of Record, page 217) that he and his partner had prepared these exhibits and in doing so had included all classes of cars placed at the mines embraced therein (which comprised 20 or less out of a total of about 150 located in the Tyrone Region, with shipments amounting in the earlier period to about 46 per cent. of the total region shipments, and in the later period to about 2 per cent.), the cars included comprising as well cars subject to allotment as those which were not so subject, the latter embracing the private or individual cars of shippers, the fuel cars of other railroad companies and the fuel cars of the plaintiff in error, in the distribution of which Jacoby & Co. under the rules of car distribution prescribed by the Commission were not entitled to share.

The distribution made at all mines in the Tyrone Region amounted in the earlier period to 30.3 per cent., and in the second period to 29.0 per cent. of the aggregate ratings of all such mines. The cars placed at Jacoby & Co.'s mine amounted to 28 per cent. and 23.9 per cent. of its rating, but as the cars placed in the region included large numbers of private or individual cars of shippers and fuel cars of the plaintiff in error and of other railroad companies, and as Jacoby & Co. were not owners of private or individual cars and were not furnishing or shipping fuel supply coal to either the plaintiff in error or any other railroad company, and had consequently not been entitled to any of these private or individual cars or any fuel cars, the region percentages were necesarily in excess of Jacoby & Co.'s. To what extent, considering the number of non-allotable cars, they should have been in excess cannot be deduced from the evidence, but an exhibit which will be found at page 268 of the Transcript of Record shows that in the period of the action more than 50 per cent. of the cars distributed in the Tyrone Region were either private or individual cars or fuel cars. It is apparent, therefore, that the fact that Jacoby & Co.'s percentages were not equal to the region percentages did not tend to establish that they had not received their proper share of the allotable or distributable cars which the plaintiff in error had for distribution among the mines in the Tyrone Region.

The judgment under review was entered after a second trial of the case, the first trial having also eventuated in a judgment in favor of Jacoby & Co., which was reversed by this Court. (See 242 U. S. 89.)

Upon the first trial Jacoby & Co., to sustain their case, put in evidence the report and orders of the Commission—but not the testimony adduced before the Commission. The plaintiff in error herein put in evidence the exhibits above referred to (Transcript, pages 260, 261), and asked the Court to instruct the jury as follows:—

> "If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9% of the aggregate of their daily mine ratings, and in the period between April 1 and October 18, 1905, cars equal in capacity to 59.6% of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located had been equal in the earlier period to 59.9% and in the later period to 59.6% of the aggregatte ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

This point was refused but such refusal was held by this Court to have been error and for such error the judgment of the District Court was reversed.

Both before this Court and the Circuit Court of Appeals it was contended upon behalf of Jacoby & Co. upon the former appeal that as the whole record of the proceeding before the Commission had not been put in evidence the jury should not have been given the instruction requested because the percentages used by the Commission in ascertaining the number of cars to which Jacoby & Co. were entitled might have been justified by evidence which the

Commission had before it other than the two exhibits in question. This Court, however, held that the exact similarity between the Commission and the exhibit percentages entitled the plaintiff in error to the instruction requested.

Upon the second trial the whole record before the Commission was put in evidence. And while nothing contained therein tended to justify the percentages used by the Commission as the basis of its award save the exhibits whose evidential value for this purpose has heretofore been condemned by this Court, it was contended by the defendant in error, and the contention was accepted by the trial Judge, that it was possible to deduce from the testimony before the Commission some other basis for its findings and award than the exhibits in question, and that consequently the plaintiff in error was not entitled to instructions, which were requested, similar to those which the Court held should have been given upon the former trial. The testimony thus relied upon it was claimed showed that the Tyrone Region had not received all the cars which should have been allotted to it due to the fact that certain mines in other regions had received cars claimed to have been in excess of their quota as the result of special orders issued by the plaintiff in error, and that sales of some of its cars had been made by the plaintiff in error to certain shippers, and it was contended that if such sales had not been made and the cars so sold had not been thereby converted into private cars of the shippers purchasing them, the Tyrone Region would have received some of these cars and would also have received some of the cars covered by the special orders referred to, and that if such additional cars had been allotted to the Tyrone Region the number of cars to which Jacoby & Co. would have been entitled would have been increased.

Some testimony bearing upon these orders and sales was also introduced upon the trial of the case, but this was merely confirmatory of the testimony adduced before the Commission and established no facts which had not been established by the testimony presented upon the hearing before the Commission.

The Commission had found, as indicated by its reports,

that the sales and orders referred to in this testimony had been made and given by the plaintiff in error and had further found that these sales and orders were violative of the Interstate Commerce Act in that they tended to secure an undue advantage to the shippers to whom the sales were made and to the shippers on whose behalf the orders were given, but held that it was difficult to determine to what, if any, extent they had actually operated to the disadvantage of Jacoby & Co. with respect to the distribution of cars made in the Tyrone Region, and consequently the Commission's award was not based upon the failure of the plaintiff in error to allot to and distribute in the Tyrone Region all the cars to which that Region was properly entitled but upon its failure to give to Jacoby & Co. relatively the same number of cars as has been given to other shippers in the Tyrone Region.

The case was submitted to the jury by the trial Judge under instructions which allowed them to find a verdict for the full amount of the award and the verdict rendered was for the full amount thereof, with interest, and upon this verdict judgment was entered.

The Circuit Court of Appeals held that the trial Court was justified in refusing to give instructions similar to those which this Court held should have been given on the former trial because upon the second trial testimony had been introduced which had not been introduced upon the first trial and in refusing other instructions requested by the plaintiff in error which refusal has been alleged as error.

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania for $36,787.45, and costs of suit, entered on the tenth day of December, A. D. 1920, in favor of said defendant in error and against said plaintiff in error.

2. The Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court of the Eastern District of Pennsylvania and in not remanding the said cause to the said District Court for a new trial.

3. The Circuit Court of Appeals erred in not sustaining the second assignment of error in the said cause, which assignment was as follows:—

> "*Second.*—The learned trial Judge erred in refusing to affirm the second point submitted by the defendant, which point and the Court's answer thereto were as follows:
>
> "'2. It appears from the record of the proceedings before the Interstate Commerce Commission that in the period between April 1st, 1904, and April 1st, 1905, the aggregate rating of all mines in the Tyrone Region, as shown by the distribution sheets of the defendant, amounted to 255,617 cars, and that the total number of cars of all classes placed at the mines in this region aggregated 77,430, or 30.3 per cent. of the aggregate region rating, and that in the period between April 1st, 1905, and October 18th, 1905, the aggregate rating of the mines in the Tyrone Region amounted to 166,434 cars, and that the number of cars of all classes placed at these mines aggregated 40,834, or 29.9 per cent. of the aggregate region rating.
>
> "'If Jacoby & Co. were entitled to share in the distribution of all the cars placed in the Tyrone Region, they would have been entitled in the period between April 1st, 1904, and April 1st, 1905, to 30.3 per cent. of their mine's aggregate rating, and in the period between April 1st, 1905, and October 18th, 1905, to 29.9 per cent. of their mine's aggregate rating.
>
> "'The second point is declined upon the ground that it is based entirely on the cars actually placed in the Tyrone region.'"

4. The Circuit Court of Appeals erred in not sustaining the third assignment of error in the said cause, which assignment was as follows:—

> "*Third.*—The learned trial Judge erred in refusing to affirm the third point submitted by the defendant, which point and the Court's answer thereto were as follows:
>
> "'3. It appears from the record of the proceedings before the Interstate Commerce Commission that the cars placed in the Tyrone Region in the two periods, according to the distribution sheets of the defendant, comprised 25,474 fuel cars, so-called, and 33,530 private or individual cars, and under the rule of distribution prescribed by the Interstate Commerce Commission, Jacoby & Co. were not entitled to have any of these cars placed at their mine, as they were not the owners of any of the private or individual cars and were not supplying any fuel coal to either the defendant or other railroad companies during the period of the action.
>
> "'The third point is declined for the same reason.'" (The Court's reference is to the reason for denying the second point.)

5. The Circuit Court of Appeals erred in not sustaining the fourth assignment of error in the said cause, which assignment was as follows:—

> "*Fourth.*—The learned trial Judge erred in refusing to affirm the fourth point submitted by the defendant, which point and the Court's answer thereto were as follows:
>
> "'4. The only cars in the distribution of which Jacoby & Co. were entitled to participate were the cars which were placed in the Tyrone Region other than the fuel cars of the defendant and of other railroad companies and the private or individual cars of shippers. These distributable cars amounted in the period of

the action to 53.454, less than 14 per cent. of the aggregate region rating of the mines in the Tyrone District.

"'The fourth point is declined for the same reason.'" (The Court's reference is to the reason for denying the second point.)

6. The said Circuit Court of Appeals erred in not sustaining the fifth assignment of error in the said cause, which assignment was as follows:—

"*Fifth.*—The learned trial Judge erred in refusing to affirm the fifth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"'5. It has been mathematically demonstrated that the award of the Interstate Commerce Commission is based upon a finding by the Commission that Jacoby & Co. in the year ending April 1st, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their mine's daily rating for 275 days, and in the period between April 1st, 1905, and October 18th, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their mine's daily rating for 138½ days. There is nothing in the record of the proceedings before the Commission to justify or explain the percentages adopted by the Commission, except the evidence which is found therein, presented upon behalf of Jacoby & Co., to the effect that the aggregate of the cars placed by the defendant at certain mines in the Tyrone Region which had been selected by Jacoby & Co. for the purpose of comparison had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines. As the number of cars placed at these mines was not the standard by which to determine the number which should have been placed at the mine of Jacoby & Co., the basis for the Commis-

sion's award is an erroneous one, and the plaintiff consequently is not entitled to recover the amount thereof.

" 'The fifth point is declined upon the ground that it asks the Court to make a finding of fact, and also upon the ground that the matter of law therein referred to has already been set out in the charge to the jury.' "

7. The Circuit Court of Appeals erred in not sustaining the sixth assignment of error in the said cause, which assignment was as follows:—

" '*Sixth.*—The learned trial Judge erred in refusing to affirm the sixth point submitted by the defendant, which point and the Court's answer thereto were as follows:

" '6. The record of the proceedings before the Interstate Commerce Commission contains no evidence from which the Commission could have ascertained the number of cars which Jacoby & Co. should have received had the defendant delivered to them their share of the distributable cars ascertained in accordance with the Commission's rule of distribution, and the award, therefore, made by the Interstate Commerce Commission is not supported by the evidence adduced before it and should therefore be disregarded by the jury.

" 'The sixth point is declined.' "

8. The Circuit Court of Appeals erred in not sustaining the seventh assignment of error in the said cause, which assignment was as follows:—

"*Seventh.*—The learned trial Judge erred in refusing to affirm the seventh point submitted by the defendant, which point and the Court's answer thereto were as follows:

" '7. No evidence has been presented which would enable the jury to determine whether Jacoby & Co., if

the rule of distribution prescribed by the Commission had been followed by the defendant, would have received any greater number of cars than were allotted and delivered to them by the defendant, and there is no evidence, therefore, before the jury which would justify it in finding a verdict for the plaintiff.

" 'The seventh point is declined.' "

9. The Circuit Court of Appeals erred in not sustaining the eighth assignment of error in the said cause, which assignment was as follows:—

"*Eighth.*—The learned trial Judge erred in refusing to affirm the eighth point submitted by the defendant, which point and the Court's answer thereto were as follows:

" '8. Under the law and the evidence the plaintiff is not entitled to recover, and your verdict should be for the defendant.

" 'The eighth point is declined.' "

10. The Circuit Court of Appeals erred in not sustaining the ninth assignment of error in the said cause, which assignment was as follows:—

"*Ninth.*—The learned trial Judge erred in refusing to affirm the ninth point submitted by the defendant, which point and the Court's answer thereto were as follows:

" '9. If the jury should find that the conclusion of the Interstate Commerce Commission, that Jacoby & Co. in the year ending April 1st, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their daily mine ratings, and in the period between April 1st and October 18th, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiff that the aggregate of the cars placed by the defendant at certain

mines, selected for the purpose of comparison from those comprised in the region in which Jacoby & Co.'s mine was located, had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiff is not entitled to recover.

" 'The ninth point is covered in the charge, so far as the Court considers it applicable in this case. It, therefore, is declined.' "

11. The Circuit Court of Appeals erred in not sustaining the tenth assignment of error in the said cause, which assignment was as follows:—

"*Tenth.*—The learned trial Judge erred in refusing to affirm the tenth point submitted by the defendant, which point and the Court's answer thereto were as follows:

" '10. It appears from the reports of the Interstate Commerce Commission that the Commission declined to make an award to Jacoby & Co. based upon sales of cars made by the defendant or the special orders directing the placing of 500 cars at the mines of the Berwind-White Company. The plaintiff cannot, therefore recover because of these sales or these orders.

' "The tenth point is declined.' "

12. The Circuit Court of Appeals erred in not sustaining the eleventh assignment of error in the said cause, which assignment was as follows:—

"*Eleventh.*—The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, which point and the Court's answer thereto were as follows:

" '11. The testimony has shown that following the sales of the cars made to the Berwind-White Coal

Mining Company and to the Keystone Coal and Coke Company, concerning which testimony has been presented in this case, orders to replace these cars were given by the defendant, and that all of the cars thus ordered in replacement of those which had been sold were delivered to the defendant more than two years preceding the period of the present action. These sales, therefore, afford no basis for a recovery in the present action, and they should consequently be disregarded by the jury.

"'The eleventh point is declined, as it asks the Court to make a finding of fact which has been argued to the jury by counsel.'"

13. The Circuit Court of Appeals erred in not sustaining the twelfth assignment of error in the said cause, which assignment was as follows:—

"*Twelfth.*—The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, which point and the Court's answer thereto were as follows:

"'12. There is no evidence before you from which you can ascertain the number of cars, if any, which Jacoby & Co. would have received during the period of the action in addition to those which were delivered by the defendant, had the defendant not made the sales of its cars referred to in the reports of the Commission, and hence the plaintiff is not entitled to recover because of these sales.

"'The twelfth point is declined.'"

14. The Circuit Court of Appeals erred in not sustaining the thirteenth assignment of error in the said cause, which assignment was as follows:—

"*Thirteenth.*—The learned trial Judge erred in refusing to affirm the thirteenth point submitted by the defendant, which point was as follows:

"'13. There is no evidence before you from which you can ascertain the number of cars, if any, which Jacoby & Co. would have received during the period of the action in addition to those which were delivered by the defendant, had the special orders for the placing of cars at the Berwind-White Company's mines not been given, and hence the plaintiff is not entitled to recover because of these special orders.

"'The thirteenth point is declined.'"

15. The Circuit Court of Appeals erred in not sustaining the fourteenth assignment of error in the said cause, which assignment was as follows:—

"*Fourteenth.*—The learned trial Judge erred in charging the jury as follows:

"'There is other evidence before the Commission which you have a right to take into consideration. There is evidence to the fact that some of the mines in that district, which were not operating at certain times, were nevertheless receiving cars. There is evidence to the effect that operators who were not demanding cars were receiving cars, having cars allotted to them. There is evidence to the effect, and it is so stated in the Commission's report, that the defendant's employees were instructed to make a distribution of at least 500 cars daily to the Berwind-White Company. There is evidence based on the testimony of Mr. Hutchinson, General Manager of the Pennsylvania Railroad Company, to the effect that these 500 cars were distributed to other regions, and that additional cars were sold to the Berwind-White Company, amounting to 1000, and to another company amounting to 700, and to another company amounting to 500, aggregating 2200, which were distributed to another region.'"

16. The Circuit Court of Appeals erred in not sustaining the fifteenth assignment of error in the said cause, which assignment was as follows:—

"*Fifteenth.*—The learned trial Judge erred in charging the jury as follows:

" 'In determining whether the Commission had before it evidence upon which it could base a finding of damages of $21,094.39 against the defendant and in favor of the plaintiff, you will take into consideration all of the testimony that was offered before the Commission, and you will also take into consideration in connection with the Commission's report in case you find it is sustained by any evidence on which the Commission could have found such a finding, or in which in your opinion such a conclusion would be reached, as a matter of fact, and you will take into consideration the other testimony which has been offered by the plaintiff in this case.' "

17. The Circuit Court of Appeals erred in not sustaining the sixteenth assignment of error in the said cause, which assignment was as follows:—

"*Sixteenth.*—The learned trial Judge erred in charging the jury as follows:

" 'So that if you find for the plaintiff it must be because you find that there was sufficient evidence before the Commission on which to base its finding, and that finding was not based on the fact that the other shippers were getting during the first period 59.9 per cent. of their rated capacity and during the second period 59.6 per cent of their rated capacity. It is for you to determine whether there is other evidence in the case which would justify the finding of the Commission of the amount which they have found in this case.' "

18. The Circuit Court of Appeals erred in not sustaining the seventeenth assignment of error in the said cause, which assignment was as follows:—

"*Seventeenth.*—The learned trial Judge erred in charging the jury as follows:

" 'In the finding of the Commission, then these orders for the distribution of 500 cars to the Berwind-White Company were stated by the Commission to have been in effect during 1902, 1903, 1904, and therefore it is for you to determine whether the fact that they were in effect during those years would bear the inference that they continued to be in effect during the time covered by these complaints. Of course it does not follow because they were in effect during those three years ending in 1904 that they continued to be in effect or that they affected in any way the distribution at this time.' "

19. The Circuit Court of Appeals erred in not sustaining the eighteenth assignment of error in the said cause, which assignment was as follows:—

"*Eighteenth.*—The learned trial Judge erred in authorizing the entry of judgment in favor of the plaintiff and against the defendant upon the verdict of the jury."

ARGUMENT.

Conclusiveness of Prior Decision of This Court.

We are dealing with a second trial of this case. The first trial resulted in a judgment for the plaintiffs which upon review by this Court was reversed (Penna. R. R. Co. *vs* Jacoby & Co., 242 U. S. 89).

The case had its inception in a proceeding before the Interstate Commerce Commission in which the plaintiffs sought an award of damages due to the alleged failure of the defendant to allot and deliver to the plaintiffs the number of coal cars which it was asserted plaintiffs should have received in the period covered by the claim.

The claim as presented to the Interstate Commerce Commission was of a two-fold character and was thus described

by counsel for Jacoby & Co. in the course of the examination of a witness before the Commission:—

> "MR. GLASGOW:—So that your complaint is made up of two items: First, that the Tyrone Region did not get its proper proportion of the entire equipment?
>
> "MR. JACOBY:—Yes, Sir.
>
> "MR. GLASGOW:—And second, that the proportion assigned to the Tyrone Region was not divided among the operators therein but that a large number of cars were taken out and arbitrarily assigned and that only the residue was divided among the mines in accordance with the percentage.
>
> "MR. JACOBY:—Yes, sir.
>
> "MR. GLASGOW:—Those are the two items in the complaint?
>
> "MR. JACOBY:—Yes, sir" (Transcript of Record, page 75).

Statements embodying the respective claims on these two grounds will be found at pages 264 and 265 of the Transcript, and from these it appears that the amount claimed on the first ground aggregated $11,504.32 and on the second ground $42,409.19.

In support of the first ground of the complaint, viz., that the Tyrone Region (the region in which the plaintiff's mine was located) ought to have received more cars for distribution among the shippers therein than it had received, evidence was adduced before the Commission that the defendant in error had in the period of the action given orders directing special deliveries of cars at the mines of a certain shipper, the Berwind-White Coal Mining Company, and that it had made sales of some of its cars to certain shippers and it was claimed that if these orders had not been given and these sales had not been made a larger number of cars would have been available to the shippers in the Tyrone Region.

With respect to the effect of these orders and sales the Interstate Commerce Commission found as follows:—

"During the years 1902, 1903, and 1904, the employes of the defendant that were in charge of the distribution of coal-car equipment had special orders for giving to the Berwind-White Coal Mining Company a special allotment of 500 cars daily. That company had contracts for supplying coal for certain steamships sailing from New York Harbor. Complaint had been made that these steamers were frequently delayed because of a lack of coal, and the defendant felt that it was warranted in making that special arrangement with the coal mines that had undertaken to supply them with fuel. This preference was the occasion of comment by the Commission in its report in the coal and oil investigation. Few, if any, of these specially assigned cars reached the Berwind-White mines in this particular mining district, and therefore it is difficult to determine to just what extent these complainants were prejudiced by that preference of a competing company's operations in another district; nevertheless it was inequitable in principle and undoubtedly so to some extent at least in its results, and we see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference of one company and district and an undue discrimination against coal operations in another district.

"Another point also mentioned in our report in the coal and oil investigation just referred to is that 1000 of the defendant's own system coal cars were sold by the defendant to and were thus made available by the Berwind-White Company. The defendant to that extent diminished its capacity to supply the coal-car requirements of other coal operations upon its lines. While the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will not be considered in this report, the least that can be said of that transaction is that it indicates a desire on the part of

the defendant at that time to forward the interest of a particular company at the expense of its competitors" (Transcript, pages 38 and 39).

It thus appears that the Commission, while condemning the orders and sales referred to, was not prepared to and did not determine to what extent, if any, Jacoby & Co. had been prejudiced thereby, and consequently when it made its award the basis thereof was the discrimination which the Commission found the plaintiff in error had subjected Jacoby & Co. to in the distribution of the cars which had been allotted to and had been distributed in the Tyrone Region in the period of the action.

The Commission in its report did not specifically find the number of cars which Jacoby & Co. should have received but it made the following findings (Transcript, page 21):—

"(*a*) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

"(*b*) That during the period from April, 1904, to March 31st, 1905, the mine was operated 275 days; and that during the second period named on the exhibits, from April 1st to October 18th, 1905, it was operated 138¼ days.

"(*c*) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,073.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods."

A mathematical calculation based upon the figures embraced in these findings demonstrates that the Commission's finding as to the number of tons for which Jacoby & Co. should have received cars was based upon the assumption that the tonnage of the cars which they should have received

should have been equal to 59.9% and 59.6%, respectively, of their mine rating in the two periods embraced in the findings of the Commission (Transcript of Record, pages 228 and 229).

At the hearing before the Interstate Commerce Commission Jacoby & Co. to sustain their claim of discrimination in the Tyrone Region distribution put in evidence two exhibits for the purpose of establishing that certain mines in the Tyrone Region had been unduly favored in the distribution of cars, and it appeared from these exhibits (which will be found at pages 260 and 261 of the Transcript of Record) that the tonnage shipped by these mines had amounted in the two periods which the Commission dealt with in its findings to 59.9% and 59.6%, respectively, of the aggregate ratings of the mines.

It was therefore evident that the Commission based its award in favor of Jacoby & Co. on the theory that they should have received relatively the same number of cars as the mines embraced in these Exhibits had received.

Upon the first trial of this case the whole record before the Interstate Commerce Commission was not put in evidence. The plaintiffs put in evidence merely the reports of the Commission. The defendant put in evidence the exhibits and testimony above referred to in order to establish the similarity between the percentages of the exhibits and the percentages adopted by the Commission, and thereupon requested the trial Judge to instruct the jury as follows:—

> "8. If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs in the year ending April 1st, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their daily mine ratings, and in the period between April 1st and October 18th, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those com-

prised in the region in which the plaintiff's mine was located had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

This point was refused, but it was subsequently held by this Court that it should have been affirmed and that the jury consequently should have been instructed that the plaintiffs were not entitled to recover in the event that the jury should find that the award of the Commission had been arrived at in the manner indicated in the point.

In its opinion this Court, referring to the testimony which had been introduced upon the trial tending to show that the Commission's award was based upon the finding or conclusion that the cars which Jacoby & Co. should have received should have been the same percentages of their aggregate mine ratings as the mines embraced in the two Exhibits already referred to had received, said:—

"This testimony was competent in order to meet the plaintiffs' case based on the orders of the Commission, and from it we think the conclusion is inevitable that the Commission may have used the percentages of 59.9 per cent. and 59.6 per cent. respectively in reaching the amount of damages awarded to the complainant. If so, the recovery was permitted, not upon the basis of damages sustained by reason of the illegal discrimination practiced against the plaintiffs as found by the Commission, but upon the basis that they were entitled to receive cars equal in ratio to those illegally and preferentially given to the certain favored companies named in the tables. The effect of the enforcement of such rule would be, not to give the shipper the damages which he actually suffered, but would base the recovery upon a rule which is condemned as to others, because of its discrimination in their

favor—a result manifestly not intended by the Act of Congress."

And consequently this Court held that the plaintiff in error "was entitled to have this eighth request given in charge to the jury."

Upon the former argument it was strenuously urged upon this Court that inasmuch as the whole record of the proceeding before the Commission had not been put in evidence upon the first trial, this Court ought not to exclude the possibility that there might have been other evidence before the Commission which would have justified the percentages adopted by it other than the two Exhibits in question, but with respect to this argument this Court said:—

"It is urged that the testimony before the Commission is not all in the record, and that for aught that appears the Commission may have reached its conclusion and awarded damages upon other and competent proofs, and it is insisted that the coincidence of the amount as awarded and the amount ascertained by the use of the percentages contained in the tables may not necessarily have controlled the action of the Commission. But it is difficult to reach the conclusion that the Commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentages shown in the tables, except by actually using them to ascertain the sum which is exactly the amount resulting from their application. The Commission might have approximated the same result by using other and legal means to ascertain the damages sustained, but when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way. At least, we think that the testimony was in such shape that, as we have already said, the company was entitled to the specific request upon this subject submitting the matter to the jury."

Upon the second trial the whole record of the proceeding before the Commission, as already stated, was put in evidence, and it is now, we submit, apparent that no testimony was presented to the Commission which would justify its adoption of the percentages used by it in making its award save the two Exhibits whose evidential value for this purpose has been already condemned by this Court.

The record being in this shape the plaintiff in error asked the trial Court to instruct the jury in accordance with the following point, which is an exact reproduction of the point which this Court held should have been affirmed upon the first trial:—

> "9. If the jury should find that the conclusion of the Interstate Commerce Commission, that Jacoby & Co. in the year ending April 1st, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their daily mine ratings, and in the period between April 1st and October 18th, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiff that the aggregate of the cars placed by the defendant at certain mines, selected for the purpose of comparison from those comprised in the region in which Jacoby & Co.'s mine was located, had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiff is not entitled to recover."

The Court in its charge dealt with this point as follows:—

> "The ninth point is covered in the charge so far as the Court considers it applicable to this case. It, therefore, is declined."

The following is the portion of the charge which the learned Judge treated as embodying sufficient instructions to

the jury with respect to the matter dealt with in this point:—

"The Court, as a matter of law, instructs you that inasmuch as the basis of the plaintiff's suit is the award of the Commission, that if you find from the evidence that the amount of damages awarded by the Commission is not justified under the instructions I have given you, your verdict should be for the defendant. So that if you find for the plaintiff it must be because you find that there was sufficient evidence before the Commission on which to base its finding, and that finding was not based on the fact that the other shippers were getting during the first period 59.9 per cent. of the rated capacity and during the second period 59.6 per cent. of their rated capacity. It is for you to determine whether there is other evidence in the case which would justify the finding of the Commission of the amount which they have found in this case.

"If you should find that the conclusion of the Interstate Commerce Commission that the plaintiff in the year ending April 1st, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their mine's daily rating, and in the period between April 1st and October 18th, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their mine's daily rating—if you should find that that conclusion was reached or arrived at because of the evidence presented by the plaintiff that the aggregate of the cars placed by the defendant at certain mines which had been selected for the purpose of comparison from those comprised in the region in which the plaintiff's mine was located, had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines, for the basis of the Commission's conclusion, then the award was an erroneous one, and under those circumstances the finding of the Commission would lose its effect as *prima facie* evidence, and you would only be

> justified in finding for the plaintiff if you find that from the other evidence offered before the Commission, either of discrimination through distribution to favored shippers in the Tyrone region or through withholding cars from the Tyrone region, which should have been distributed there, the Commission was justified in arriving at that conclusion. If you find that the Commission was justified in arriving at that conclusion, or are satisfied from that evidence, and that evidence is reinforced by further evidence that the plaintiff has offered in the case, then you would be justified in finding a verdict in favor of the plaintiff, and assessing damages at the amount found by the Commission."

The jury were thus instructed that they might render a verdict for the amount of the award made by the Commission even though the award was an erroneous one because of the basis therefor adopted by the Commission, if the jury should find, to quote from the charge, "that from other evidence offered before the Commission either of discrimination through distribution to favored shippers in the Tyrone Region or through withholding cars from the Tyrone Region which should have been distributed therein, the Commission was justified in arriving at that conclusion."

Passing for the moment consideration of this instruction in the light of the decision of this Court, the attention of the Court is asked to these considerations:—

(*a*) The instruction given permitted the jury to render a verdict for the amount of the award if they found from other evidence than the exhibits referred to there had been "discrimination through distribution to favored shippers in the Tyrone Region."

The record of the proceedings before both the Commission and the Court below will be searched in vain for any evidence whatever tending to establish "discrimination through distribution to favored shippers in the Tyrone Region" with the exception of the two exhibits that for

evidential purposes may be regarded as no longer in the case in the sense that they afford a basis for the ascertainment of the loss sustained by Jacoby & Co. because of any such alleged discrimination. There is not a scintilla of evidence tending to establish such discrimination other than the Exhibits and neither the trial Judge in his opinion refusing a new trial nor the Circuit Court of Appeals in its opinion sustaining the judgment in favor of Jacoby & Co. were able to refer to any evidence whatever tending to show that Jacoby & Co. had not received their fair share of the cars which had been distributed in the Tyrone Region save the two Exhibits which this Court has held did not afford a proper basis for the Commission's finding.

All the other testimony on this subject negatives the view that Jacoby & Co. were discriminated against in the distribution of cars in the Tyrone Region.

In the two periods of the action the cars which Jacoby & Co. had actually received amounted according to their own evidence to 28 per cent. and 23.9 per cent. respectively of their mine's rating, while it is agreed that the cars distributed in the Tyrone Region in the two periods amounted to 30.3 per cent. and 9.9 per cent. of the aggregate rating of the mines in the region (Transcript of Record, pages 230, 231).

That the Region percentages slightly exceeded those of Jacoby & Co. is due to the consideration that the distribution made in the Tyrone Region included large numbers of private cars of shippers and of fuel cars of the plaintiff in error and other railroad companies, and in the distribution of these Jacoby & Co. were not entitled to share, due to the fact that they owned no private cars and were not shipping any fuel coal to the plaintiff in error or to other railroad companies, and under the rule established by the Commission, which will be found at page 251 of the Transcript of Record, they were consequently not entitled to receive any of these classes of cars, although they were entitled to have them counted as against the shippers receiving them in the ascertainment of the number of the railroad company's cars, other than fuel cars, which should be allotted to them.

The extent to which the individual and fuel cars figured in the distribution actually made in the Tyrone Region is shown by an exhibit found at page 268 of the Transcript of Record, in which it appears that in the period of the action 112,467 cars were distributed to the mines in the Tyrone Region and that of these 59,013 cars were individual or fuel cars.

So that not only was there no evidence outside of the exhibits to which reference has already been made which tended to establish that Jacoby & Co. had not received their fair share of the cars distributed in the Tyrone Region, but the evidence bearing upon this point tends to establish most conclusively that they had received their fair share.

While it is not a matter of any moment, it may be well to call the attention of the Court to the fact that the existence of these individual and fuel cars accounts for the large percentage received by the mines embraced in the two exhibits which were used by the Commission as the basis for its award.

These exhibits had been made up by Jacoby & Co. and they admitted that they had included in the numbers of cars which appear therein as placed at the mines embraced in the exhibits all individual and fuel cars which had been placed at these mines (Transcript of Record, page 217).

Those who prepared the exhibits further stated that they had not computed the number of individual and fuel cars placed at any of the mines except those placed at the mines of the Berwind-White Coal Mining Company and the Lehigh Valley Coal Company. These they had computed and it appeared that in the earlier period the Berwind-White Company mines, which had an aggregate rating of 24,260 cars, had received 13,452 cars, and in the later period 7154 cars, and that all of these cars, with the exception of 460 in the first period and 60 in the second period, had been individual and fuel cars (Transcript of Record, page 218 *et seq.*).

And as to the Lehigh Valley Coal Company's mines it appeared that 4267 cars of the Lehigh Valley Railroad Company had been included in the 8538 cars placed at the mines (Transcript, page 153).

But not only was there a total lack of testimony of "discrimination through distribution to favored shippers in the Tyrone Region" save the Exhibits in question, but it is disclosed by the Record that the plaintiffs' claim as submitted to the Commission was based upon these Exhibits.

At pages 264 and 265 of the Transcript of Record will be found what is designated as "Plaintiffs' Exhibit No. 12." This Exhibit embodies what is entitled the amended statement of claim of the plaintiffs divided into the two periods into which the Commission divided the period of the action and embraces the several items of their claims.

With respect to the loss resulting from the alleged unlawful distribution of cars in the Tyrone Region in the first of these two periods, the claim is thus stated: "Tonnage actually shipped by 20 certain mines on the Tyrone Division during said period as shown by P. R. R. Co.'s distribution sheets and by Statement No. 10 herewith." Statement No. 10, which will be found at page 260 of the Transcript of Record, is the Exhibit which shows that in the period between April 1, 1904, and April 1, 1905, these 20 mines received cars equal on an average to 59.9 per cent. of their aggregate mine ratings. And in this Exhibit No. 12 the percentage of 59.9 per cent. is used as a measure of the plaintiffs' right. Their claim for the second period is presented in this Exhibit in the same way, the percentage used, however, being 59.6 per cent.

It appears from this Exhibit No. 12 that the amount claimed by Jacoby & Co. on account of alleged discrimination in the distribution of cars in the Tyrone Region exceeded the amount allowed by the Commission. The failure of the Commission to allow the full amount claimed on this account was due, as is apparent, not to their refusal to accept the percentages embraced in the Exhibits but to their refusal to accept the loss per ton claimed therein.

This same Exhibit also shows the loss claimed on account of alleged discrimination against the Tyrone Region, the total amount thus claimed in the two periods being $11,504.32.

It appears, therefore, that Jacoby & Co. not only put in evidence the two percentage Exhibits as evidence of the discrimination against their mine in the Tyrone Region distribution, but relied upon these Exhibits as the measure of their loss, and when it appears that in determining their loss the Commission did so upon the basis of the percentages used in these Exhibits and claim, can there be room for doubt or controversy as to what the basis of the Commission's award was?

The fact is that no effort was made by Jacoby & Co. either in the proceeding before the Commission or upon either of the trials to establish by testimony the number of cars which they should have received under the Commission's rule of distribution. The proposition upon which they relied was that they were entitled to the same number of cars as the so-called favored shippers had received, and consistently throughout the proceeding and until this Court determined otherwise they insisted upon the correctness of this view. And even upon the second trial of the case, as the record discloses, no effort was made to establish that they had failed to receive their proper share of the cars distributed in the Tyrone Region, under the Commission's rule of distribution. It must, of course, be borne in mind that the instruction of the trial Judge that the jury could find a verdict for the plaintiffs for the amount of the award if they found from other evidence than the Exhibits in question that there had been "discrimination through distribution to favored shippers in the Tyrone Region" *could only have been justified if there had been both evidence of discrimination and evidence as to the loss incurred by Jacoby & Company attributable to such discrimination. The Commission had determined the rule of distribution that the plaintiff in error should have conformed to in the period of the action, and of course if Jacoby & Company had failed to receive the number of cars which they were entitled to under this rule, their loss is to be measured by the difference between the number of cars which they should have received and those which they had actually*

received. But as has already been said no evidence whatever was introduced by Jacoby & Company which tends to throw any light upon the number of cars which should have been delivered to them under the Commission's rule.

It was stipulated upon the trial (Transcript of Record, page 230) that in the first period the cars of all classes placed in the Region amounted to 30.3 per cent. of the aggregate ratings of all mines in the Region, and in the second period they amounted to 29.9 per cent. of the ratings, whereas the award of the Commission is based upon the conclusion or finding that Jacoby & Company should have received in the first period cars equal to 59.9 per cent and in the second period to 59.6 per cent. of their mine's rating, these percentages being almost double those of the Region percentages. Clearly it would seem that in the absence of evidence tending to establish the right of Jacoby & Company to an allotment of cars practically twice as great as that which the Region as a whole received the jury should not have been instructed that they could find a verdict for the amount of the Commission's award if in their judgment there was testimony before the Commission which would have justified a finding that Jacoby & Company, notwithstanding the Region percentages, were nevertheless entitled to the higher percentages which were the basis of the Commission's finding.

(*b*) The instruction given to the jury further permitted the finding of a verdict equal to the amount of the Commission's award, if the jury found from other evidence than the two exhibits that there had been discrimination against Jacoby & Co. "through withholding cars from the Tyrone Region which should have been distributed therein."

But it appears from the record of the proceedings before the Commission that the plaintiff's claim of loss due to alleged withholding of cars from the Tyrone Region was limited to $11,504.32 (Transcript of Record, page 267), whereas the Commission's award was $21,094.39.

We shall later on refer to the lack of evidence to support the loss claimed on this account and to the effect of the Commission's refusal or failure to award damages on this ground, but apart from these considerations it is manifest that the trial Judge was not justified in instructing the jury, as he in effect did, that there was evidence which would justify them in finding a verdict for the amount of the Commission's award due to the alleged discrimination against the Tyrone Region.

(c) But apart from the consideration just alluded to, the jury under the instructions given were permitted and indeed required to determine what number of cars should have been assigned to the Tyrone Region in the period of the action, in view of the sales made, which it was claimed affected the number of cars allotted to that Region.

With respect to these sales the contention of the defendant in error apparently is that they should be treated as nullities and that in arriving, therefore, at the distribution of its cars which the plaintiff in error should have made, the cars embraced in these sales should be treated as still belonging to the plaintiff in error and consequently subject to allotment among its shippers, notwithstanding the fact that they had actually been sold to certain of these shippers and had thus become their private cars. These cars by virtue of the sales made had undoubtedly become private cars of the shippers purchasing them and whether, because of the circumstances connected with their sale, the plaintiff in error was required in making distribution of its cars to treat them differently from the other private cars of shippers was purely an administrative question for the determination of the Commission and not a question for determination by a court and jury. It necessarily involved a rule of distribution as to which uniformity of treatment was necessary and under the well-settled rule established by the decisions of this Court the rule to be followed was not subject to the varying determination of juries or courts, but must be determined by the tribunal whose determination would necessarily lead to uniformity of application.

The Commission in the present case, with knowledge that these sales had been made, declined to give any effect to them, and adhered to and reiterated in the present case the rule of distribution which it had previously established, under which the owners of individual cars were entitled to their exclusive use and made no exception as to the cars thus sold. In the light of this conclusion of the Commission, what justification is there for the claim made by the defendant in error in the present case, that in determining the number of cars which the Tyrone Region ought to have received, the cars sold should nevertheless be treated as subject to allotment and distribution notwithstanding the fact that by reason of their sale they had become individual cars, and as such under the ruling of the Commission were not subject to allotment or distribution?

It is hardly necessary to refer to the decisions of this Court which have so conclusively determined the proposition that the correct method of car distribution is an administrative question for the sole determination of the Commission, and that whatever determination is reached by it is not subject to question or review in the courts. The case of Morrisdale Coal Company *vs.* Pennsylvania Railroad Company, 230 U. S. 304, is a case in point.

That case involved the right of a shipper to recover upon the theory that he ought to have received his proportionate share of all cars which the railroad company had for distribution, without regard to the consideration that some of these were individual cars and some fuel cars. But this Court held that the action could not be maintained because it was for the Interstate Commerce Commission to determine as an administrative question what the proper rule of distribution should have been, and until the judgment of the Commission in respect to this question had been invoked and secured, the courts could not entertain actions based upon alleged unlawful methods or rules of distribution pursued or established by a railroad company.

The present case is stronger than the Morrisdale case, for here, Jacoby & Co., prior to the bringing of their

action had resorted to the Commission and had sought to secure from it redress because, *inter alia*, the plaintiff in error had deprived the region in which their mine was located of cars which they contended would have been delivered to it had certain cars not been converted from company or distributable cars into individual or nondistributable cars.

On such an issue the defendant in error's contention necessarily involves the proposition that if a proper rule of distribution had been followed, the cars so sold would have been treated as distributable cars notwithstanding the fact that they had become individual cars of a shipper, because unless the cars were to be treated as distributable, it is manifest that the Tyrone Region had not been discriminated against because it had not received any portion thereof.

But the Interstate Commerce Commission, when appealed to, declined, because of these sales, to modify or depart from the rule of distribution which it had prescribed as proper, under which these cars were not distributable cars, and to allow the plaintiff, therefore, to recover because the Tyrone Region had been deprived of a portion of these cars would mean, it is submitted, necessarily a nullification of the Commission's conclusion and ruling, and would be, therefore, in the teeth of the decisions of this Court above referred to.

But apart from these considerations, important though they are, there remains the controlling one that the plaintiff in error was entitled under the decision of this Court to the instruction refused.

This Court held that upon the record on the first trial the jury should have been instruced that if the Commission's award was based upon the two exhibits to which we have already referred, "the basis for the Commission's conclusion and award was an erroneous one and the plaintiff was not entitled to recover," to quote from the point of the plaintiff in error which this Court held should have been affirmed.

Clearly, it would seem, the plaintiff in error was entitled to the same instruction upon the second trial, unless the case presented upon this trial differed in some material aspects from that presented on the first trial.

In the view of the trial Judge there were material distinctions between the cases presented on the two trials and for convenience of reference we reproduce here what was said by the trial Judge in support of this view in his opinion refusing a new trial. After referring to portions of his charge bearing upon the similarity between the figures used by the Commission in arriving at its conclusion and those embraced in the Exhibits which this Court has condemned, the trial Judge said:—

> "The jury were also instructed, which was in the defendant's favor, that their verdict should not exceed the amount of the damages found by the Commission. It was for the jury to find under the evidence whether the 640 cars* distributed to other divisions, or the 500 cars arbitrarily allotted to Berwind-White Coal Company, if distributed pro rata, would have brought the daily allotment up to a sufficient number of cars to show that the plaintiffs upon being deprived of their share suffered in damages to the extent found by the Commission. There was every endeavor at the trial to be guided by the opinion of the Supreme Court and to give the defendant the full benefit of its point in so far as it was applicable to the testimony presented at the present trial. If it had been given in charge to the jury as requested, it would have confined their consideration merely to the report of the Commission and the testimony which was presented at the former trial. It would have taken away from their consideration all the additional evidence offered at the present trial."

* An error of the trial Judge, Jacoby & Company's claim was that the daily distribution had been affected to the extent of 140 cars by the sales made.

It is true that certain evidence bearing upon the sales and orders referred to by the trial Judge was not before the jury upon the first trial, but there was before the jury on that trial the report of the Interstate Commerce Commission which referred to the orders and sales which the evidence related to, and as this report was given in evidence and as the findings contained therein with respect to such orders and sales were not only evidence, but conclusive evidence that such orders had been given and such sales had been made, due to the fact that the plaintiff in error had introduced no testimony to controvert the findings of the Commission, the Court and jury upon the first trial had before them conclusive proof that the orders had been given and the sales had been made upon which Jacoby & Co. relied to establish discrimination against the Tyrone Region.

And upon the former argument of this case before this Court it was strongly urged by counsel for Jacoby & Co. that these sales and the special orders relating to the delivery of cars to the Berwind-White Coal Company's mines, might have been found by the jury a justification for the Commission's finding, but this Court, because of the exact similarity between the Commission's finding and the two exhibits which had been given in evidence as the basis of plaintiff's claim, held that this similarity could not be ignored.

This Court, consequently, nothwithstanding proof as to these orders and sales contained in the record upon which it passed, held that the jury ought to have been instructed that the plaintiff was not entitled to recover if the jury found that the Commission had based its award upon the exhibits which the Court held afforded no justification therefor.

We confidently submit that the instruction given to the jury upon the second trial cannot be sustained in view of the decision of this Court which reversed the judgment entered upon the verdict obtained upon the first trial of this case. By the instruction given the jury were told that even

though they should find that the conclusion of the Commission that Jacoby and Company were entitled to cars equal in the first period to 59.9 per cent. and in the later period to 50.6 per cent. of the aggregate ratings of their mines was based upon evidence that other shippers had received cars equal to these percentages of their mines' aggregate ratings, they could nevertheless find a verdict for the plaintiff for the amount of the award if they found that the Commission was justified in arriving at its conclusion on some other theory or basis than that actually adopted by it.

If the trial Judge was justified in submitting this question to the jury he would have been equally justified in doing so even if the Commission had declared in so many words that its award in favor of Jacoby and Company was based upon the exhibits which contained the percentages in question, because it might still have been possible under the learned Judge's view of the case that other evidence had been offered before the Commission which would have justified it in arriving at the conclusion which it did reach as to the number of cars which Jacoby and Company should have received.

If there had been a specific disclosure by the Commission of the basis of its conclusion and award, it is difficult to believe that the trial Judge would have instructed the jury that they could render a vedict for the amount of the award if in their opinion the Commission might have reached the same conclusion on some other theory or view of the case, but if in the case we have put the Court could not have permitted the jury to thus revise the Commission's conclusion what justification exists for the instruction which has been given in the present case which was to the effect that even if the jury should find that the Commission's award was based upon the exhibits in question, they nevertheless could render a verdict for the amount of the same, if in their judgment the Commission might, under the evidence submitted to it, have made an award on some other ground.

Under the instruction given, the jury, to quote from the

opinion of the trial Judge refusing the motion for a new trial, "rendered a verdict in favor of the plaintiff for $36,787.45. This is the equivalent of the award by the Commission of $21,094.39, principal, with interest at six per cent. from June 28th, 1907." If, therefore, the present judgment should be sustained the defendant in error will have secured the benefit of a recovery which was thus characterized by this Court in its opinion reversing the judgment upon the first trial. Referring to the relevancy of the testimony tending to show the correspondence between the Commission's figures and those of the exhibits which showed deliveries to the alleged favored shippers and to the probability that these percentages were used by the Commission in arriving at its conclusion and award, this Court said:—

> "If so, the recovery was permitted, not upon the basis of damages sustained by reason of the illegal discrimination practiced against the plaintiffs as found by the Commission, but upon the basis that they were entitled to receive cars equal in ratio to those illegally and preferentially given to the certain favored Companies named in the tables. The effect of the enforcement of such rule would be, not to give the shipper the damages which he actually suffered, but would base the recovery upon a rule which is condemned as to others, because of its discrimination in their favor, —a result manifestly not intended by the Act of Congress."

There cannot now be any reasonable doubt as to the basis of the Commission's award. When the case was here before, this Court held that the jury should have been given an instruction similar to that which the Court refused to give upon the second trial, notwithstanding the fact that the entire record before the Commission had not been given in evidence upon the first trial and that consequently there was a possibility, however remote, that some other testimony or proof might have justified the Commission in

using the percentages which it used in making its award. Notwithstanding this possibility this Court in its decision said:—

> "But it is difficult to reach the conclusion that the Commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentages shown in the tables, except by actually using them to ascertain the sum which is exactly the amount resulting from their application. The Commission might have approximated the same result by using other and legal means to ascertain the damages sustained, but when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way."

What was then difficult is now impossible.

In instructing the jury that they might render a verdict for the amount of the award if they found that there was testimony before the Commission other than upon which the Commission acted which would have justified the Commission in arriving at the conclusion which it had arrived at, the trial Judge, we submit, also overlooked or ignored the character of the action.

The action was brought to recover an award made by the Interstate Commerce Commission.

Before the Commission Jacoby and Company had sought an award upon the ground that the Tyrone Region had been discriminated against due to the special orders for delivery of cars to shippers in other Regions and to the sales of some of its cars which had been made by the plaintiff in error, to which reference has already been made. But the Commission declined or failed to make an award upon either of these grounds.

If Jacoby and Company's complaint before the Commission had been confined to the alleged discrimination against the Tyrone Region and the Commission had refused relief, the case would have been at an end because Jacoby and

Company, having elected to proceed before the Commission, could not thereafter proceed, save for the recovery of an award which the Commission might have made, in any Court for the relief sought before the Commission because of the following provision of the Interstate Commerce Act:—

> "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt" (Section 9).

In the present instance Jacoby and Company, it is true, secured an award from the Commission but upon another and distinct cause of complaint than the alleged discrimination against the Tyrone Region, and *to permit them in an action upon this award to recover the amount thereof because of the alleged discrimination against the Tyrone Region, after the Commission had denied relief on this ground, would go counter both to the letter and the spirit of the provision of the Interstate Commerce Act above quoted.*

Having regard to this consideration the plaintiff in error asked the trial Judge to instruct the jury as follows:—

> "It appears from the reports of the Interstate Commerce Commission that the Commission declined to make an award to Jacoby and Company based upon sales of cars made by the defendant or the special orders directing the placing of 500 cars at the mines of

the Berwind-White Company. Plaintiff cannot, therefore, recover because of these sales or these orders." (Eleventh Specification of Error.)

The trial Judge declined to affirm this point and the result has been that Jacoby and Company after availing themselves of their remedy before the Commission, and after failing to secure the relief sought, have been permitted, with respect to the same cause of complaint which failed before the Commission, to secure a verdict in a Court of the United States and have thus had the benefit of the double remedy which the Interstate Commerce Act clearly prohibits.

But not only have the defendants in error been permitted to recover with respect to a cause of action which was submitted to the Commission and as to which relief was denied, but they have been further permitted to make use of the award made by the Commission as evidence to establish their right to recover in respect to a cause of action as to which relief was denied by the Commission. Certainly it would seem that this is a clear perversion of the provision of the Interstate Commerce Act which makes available for evidential purposes findings and orders of the Commission.

The Commission's findings are evidence because they are supposed to embody conclusions of the Commission with respect to the matters dealt with therein, but to permit findings of the Commission to be used in order to make out a *prima facie* case in support of a claim which the Commission had itself refused to sustain, involves not alone, a clear departure from the purpose of the Act in making these findings *prima facie* evidence, but a serious denial of the rights of litigants.

Take the present case as an illustration. We have here a finding by the Commission that Jacoby and Company should have received cars equal to the average of the deliveries made to certain other mines in the Tyrone Region, and we have this finding used in support of the claim that

the Tyrone Region should have received more cars than had been allotted to it, and that of these additional cars Jacoby and Company should have received a certain portion.

The findings of fact made by the Commission can, we submit, be lawfully used only for the purpose of establishing a *prima facie* case in support of the claim with respect to which the findings were made, and they cannot be used in support of some other claim especially one that the Commission has rejected.

In the present case Jacoby and Company presented their claim to the Commission based upon alleged discrimination against the Tyrone Region and failed to secure any redress from the Commission on this ground, and they should not be permitted in an action to recover the amount of the award made by the Commission on other grounds to use findings of the Commission in support of their claim based on discrimination against the Tyrone Region, when these findings have no relation to the claim thus made and denied.

We are bound to assume for the purposes of the present case that if the instruction had been given which was refused by the Court, the jury might and unquestionably should have found that the Commission's award was based upon the theory that Jacoby and Company ought to have received the same percentage of cars as had been delivered to the mines embraced in the two exhibits to which we have already referred. And if this should have been their conclusion how can the award properly be treated as embodying a finding of the Commission as to the damages which Jacoby and Company had sustained due to the failure of the plaintiff in error to allot to the Tyrone Region cars which that Region ought to have received.

Insufficiency of Evidence to Establish Discrimination Against Tyrone Region.

The discrimination alleged was brought about, it is claimed, by reason of certain sales of its cars which had been made by the plaintiff in error to some of its shippers

in the year 1902, and by orders which had been issued by it for delivery of certain cars at the mines of a shipper located in another Region than the Tyrone.

The sales complained of, as appeared from the testimony introduced by the plaintiff, had been made in the year 1902.

The defendant established by the testimony of Mr. Porcher, its Purchasing Agent, that after these sales had been made, orders were at once placed for the construction of cars to replace those sold, and that the cars thus ordered were all delivered to the plaintiff in error before the close of the year 1903, or some months before the period of the action which begins April 1st, 1904.

The testimony of Mr. Porcher on this point, which will be found at page *232 et seq.* of the Transcript of Record, was as follows:—

> "Q. Have you any familiarity or knowledge of the transactions involving the sale of 1000 coal cars to the Berwind-White Coal Mining Company and of 500 cars to the Keystone Coal and Coke Company?
>
> "A. Yes, sir.
>
> "Q. Will you please state what you know of that transaction? In the first place, when did that transaction take place—those sales?
>
> "A. It took place in 1902.
>
> "Q. In the year 1902?
>
> "A. The year 1902.
>
> "Q. What did the transactions involve?
>
> "A. The transactions involved the sale of certain coal cars, the hopper coal cars to the Berwind-White Coal Mining Company and to the Keystone Coal and Coke Company, and the replacement of them by the purchase on the part of the Pennsylvania Railroad Company of the same number of cars to take their places.
>
> "Q. Were the sales of cars completed cars, or of cars under construction? Do you recall that?
>
> "A. They were the sales of both. They were partly completed, in the case of the Berwind-White Coal

Mining Company, and partly cars under construction, I think, in the case of the Keystone Coal Mining Company, cars under construction, if my recollection is right, or about to be constructed.

"Q. When were the replacement orders which you speak of given?

"A. I would like to refer to my record here. With regard to the 1000 for the Berwind-White Coal Mining Company, the order for replacement was given by the Pennsylvania Railroad Company on the eighteenth day of July, 1902.

"Q. Can you give us about the date when all the cars under that replacement order—when the completion of deliveries of cars under the replacement order took place?

"A. All of the cars on that order were completed and delivered to the railroad company by the twenty-fourth of November, 1902.

"Q. The twenty-fourth of November, 1902?

"A. Yes, sir.

"Q. How as to the replacement order for the cars sold to the Keystone Coal and Coke Company?

"A. That was for the number of 500 cars, and that order, the replacement order for that number of cars was made on September 20th, 1902.

"Q. About what time were the cars all delivered?

"A. I am looking to see, sir. Those cars were replaced between November 26th, 1902, and December 8th, 1902, according to my records here.

"Q. That is, the replacement order was completely filled by deliveries of cars by December 8th, 1902?

"A. According to my records, yes, sir.

"Q. Are you familiar also with the sale of cars to the Ellsworth Company?

"A. I am not very familiar with that. I had to do with the purchase of cars for the Eastern end of the Pennsylvania Railroad Company, and those Ellsworth cars were probably for the lines west, and while I had

some knowledge of the circumstances, I had, as I recollect, nothing to do with the transaction itself.

"Q. You do know, do you, that those cars were not intended for the Pennsylvania Railroad Company, but whatever sale was made, was made of cars which were intended to be used on the Pennsylvania Lines West of Pittsburgh?

"A. Yes, sir."

No attempt was made to controvert this testimony of Mr. Porcher nor was any testimony introduced in order to establish that the sales made in 1902 had exerted any influence whatever upon the number of cars allotted to the Tyrone Region after April 1st, 1904, and certainly it would seem that in order to justify the jury in finding that sales made in 1902 had diminished the car supply in the Tyrone Region in 1904 and 1905, some evidence to support such a proposition should have been forthcoming. But there is no such evidence in the record and the jury were consequently instructed that they might assume that the Tyrone Region's car allotment from April 1st, 1904, to October 18th, 1905, had been diminished by sales of cars made in 1902, and this despite the fact that all cars thus sold had been replaced before the period of the action.

Having regard to the situation just referred to, we submit that the eleventh and twelfth points presented by the plaintiff in error should have been affirmed. These points, which are found in the Specifications of Error, together with the answers of the trial Judge thereto, are subjoined:—

"11. The testimony has shown that following the sales of the cars made to the Berwind-White Coal Mining Company and to the Keystone Coal and Coke Company, concerning which testimony has been presented in this case, orders to replace those cars were given by the defendant, and that all of the cars thus ordered in replacement of those which had been sold were delivered to the defendant more than a year preceding the period of the present action. Those sales,

therefore, afford no basis for a recovery in the present action, and they should consequently be disregarded by the jury.

" 'The eleventh point is declined, as it asks the Court to make a finding of fact which has been argued to the jury by counsel.'

"12. There is no evidence before you from which you can ascertain the number of cars, if any, which Jacoby & Co. would have received during the period of the action in addition to those which were delivered by the defendant had the defendant not made the sales of its cars referred to in the reports of the Commission, and hence the plaintiff is not entitled to recover (because) of those sales.

" 'The twelfth point is declined.' "

With respect to the effect upon the Tyrone Region of the orders calling for the delivery of 500 cars to the Berwind-White Coal Mining Company, the case is as follows:—

The plaintiff did not undertake or attempt to show what cars, if any, had been placed at the mines of the Berwind-White Coal Mining Company pursuant to these orders which were in excess of the number to which the mines were entitled as their allotable share of the cars available for distribution.

In their exhibits and in their presentation of the case, the plaintiff assumed, although there was nothing to support such an assumption, that the orders were intended to secure to the Berwind-White Coal Mining Company 500 cars a day in excess of their daily quota and that cars to this number in excess of such quota had been delivered.

It would seem that it was incumbent upon the plaintiff to prove what deliveries had been made under these orders, for, of course, the mere issuance of such orders caused no damage to Jacoby & Co. or to any other shippers. But as already stated, the plaintiff did not offer any proof with respect to the actual deliveries made.

The plaintiff in error did establish by the testimony of

Edward B. Chase the number of cars of all kinds, including the individual cars of the Berwind-White Company, which were placed during the period of the action at the mines to which the orders applied, and at page 330 of the Transcript of Record will be found an exhibit which shows the number of cars so placed.

It is manifest from this exhibit that the cars placed at the mines of the Berwind-White Company averaged far less than 500 per day, and as they were entitled to a large number per day as their quota of the cars distributed, the cars which they received under the special orders must have been far less than 500 per day. Indeed, it is impossible to determine from the evidence in the case that any cars in excess of their quota were placed at these mines, and as it was incumbent upon the plaintiff to show the extent to which Jacoby & Co. had been deprived of cars due to deliveries under these orders, and as there was no evidence whatever from which the jury could determine whether they had been so deprived, and if so to what extent, the plaintiff in error asked the Court to instruct the jury as follows:—

> "13. There is no evidence before you from which you can ascertain the number of cars, if any, which Jacoby & Co. would have received during the period of the action in addition to those which were delivered by the defendant had the special orders for the placing of cars at the Berwind-White Company's mines not been given, and hence the plaintiff is not entitled to recover because of thos special orders." (Fourteenth Specification of Error.)

The trial Judge declined this point and the jury were consequently permitted to guess at the number of cars which the Berwind-White Company got as the result of the special orders issued by the plaintiff in error, to guess at the number which they so received which would have been allotted to the Tyrone Region had the Berwind-White Company not received them, and at the number which

Jacoby & Co. would have received of those which would have been allotted to the Region.

And in respect to the effect which the jury should give to these orders the trial Judge, we submit, commited an error which forms the subject of the seventeenth assignment of error.

The Commission in its report found that these orders were in effect during 1902, 1903 and 1904, while the period of the present action which began April 1st, 1904, extended down to October 18th, 1905. In his charge to the jury the trial Judge failed to call attention to the fact that these orders had not been operative throughout the entire period of the action, and upon his attention being called to this fact at the conclusion of his charge he instructed the jury as follows:—

> "In the finding of the Commission, then, those orders for the distribution of 500 cars to the Berwind-White Company were stated by the Commission to have been in effect during 1902, 1903, 1904, and therefore it is for you to determine whether the fact that they were in effect during those years would bear the inference that they continued to be in effect during the time covered by these complaints. Of course it does not follow because they were in effect during those three years ending in 1904 that they continued to be in effect or that they affected in any way the distribution at this time." (Seventeenth assignment.)

The permission thus given to the jury to infer that orders which the Commission had found were in effect in the years 1902, 1903, and 1904 might have continued in effect during 1905 is wholly unjustified. Indeed what the trial Judge said at the conclusion of his statement to the jury is a sufficient refutation of such a proposition.

"Of course," said the trial Judge, "it does not follow because they were in effect during these three years ending in 1904 that they continued to be in effect." If it did not follow that the orders were in existence in 1905 because

they had been in existence in the three years prior thereto, then the jury had no right to infer or assume their existence in that year.

With respect to his instruction to the jury the trial Judge in his opinion refusing a new trial said:—

> "The question was left to the jury upon the ground that when it is once established that a condition or fact exists it is presumed to continue for a reasonable time thereafter until the contrary is shown. There was nothing in the case to show that orders for car allotments were made annually so that it was for the jury to draw whatever inference was justified by the fact that the order was in effect in 1902, 1903 and 1904."

It hardly requires argument, we submit, to refute the proposition that the jury was justified in finding that the orders in question were in force in 1905 because the Commission had found that they were in force in 1902, 1903 and 1904.

FIFTEENTH SPECIFICATION OF ERROR.

In the course of his charge to the jury the trial Judge said:—

> "There is other evidence before the Commission which you have a right to take into consideration. There is evidence to the effect that some of the mines in that district, which were not operating at certain times, were nevertheless receiving cars. There is evidence to the effect that operators who were not demanding cars were receiving cars, having cars allotted to them. There is evidence to the effect, and it is so stated in the Commission's report, that the defendant's employees were instructed to make a distribution of at least 500 cars daily to the Berwind-White Coal Company. There is evidence based on the testimony of Mr. Hutchinson, General Manager of the Pennsyl-

vania Railroad Company to the effect that these 500 cars were distributed to other regions, and that additional cars were sold to the Berwind-White Company, amounting to 1000, and to another company amounting to 700, and to another company amounting to 500, aggregating 2200, which were distributed to another region."

Upon the conclusion of his charge the Judge's attention was called to the fact that there was no such evidence in the case. Thereupon the following colloquy occurred:—

"Mr. Glasgow:—I misled your Honor. I intended to call your attention to it when you charged. About the idle mines. That evidence was in the former trial, and I thought I had put it in here, that I had not.

"The Court:—I had the impression it was in here, too. I suppose I had been reading the testimony of the former trial.

"Mr. Glasgow:—Yes. I would ask your Honor to direct the jury as to that.

"The Court:—Gentlemen, counsel have called my attention to the fact that the Court inadvertently referred to testimony which was not in the case, and that is as to the deliveries by the railroad company of cars to idle mines, and I want to withdraw any impression that has been made upon you by the Court on that point, because it appears there is no such evidence offered before the jury, and you are not to consider that there was any such evidence, and you are not to base your findings at all on any such fact."

The Judge thus withdrew from the jury what he said as to the delivery by the railroad company of cars at idle mines, but he did not withdraw the statement to the jury that they might consider evidence "that operators who were not demanding cars were receiving cars, having cars allotted to them."

The record contains no evidence tending to establish that

any such deliveries of cars had been made, and it was error and injurious error for the trial Judge to have allowed his statement to the jury to such effect to stand, particularly after his attention had been called to it.

The Circuit Court of Appeals, in its opinion disposing of the case, dealt practically with none of the contentions which are here advanced and which were also urged upon that Court. The Court adopted as the basis for its opinion and decision the opinion of the trial Judge overruling the motion for a new trial. It held that because of the new evidence which had been introduced upon the second trial the trial Judge had been justified in submitting the case to the jury under the instructions to which we have already called attention. As its opinion discloses the Court did not deal with arguments which had been addressed to it to the effect that this additional testimony did not tend to make out a case essentially different from that which was before this Court when it had under review the judgment entered in favor of Jacoby & Co. upon the verdict in their favor upon the first trial, nor did it undertake to show upon what theory the jury should have been permitted to pass upon the administrative questions involved in the determination of the question as to what cars the Tyrone Region should have received in the period of the action under the conditions created by the sales to shippers of some of the plaintiff in error's coal cars. The Court contented itself with the statement that evidence had been given upon the second trial which had not been given upon the first trial, and that this evidence was of such a character as to justify the trial Judge in refusing to give the instruction which this Court held should have been given upon the first trial, and in instructing the jury in the manner in which he did that they might determine whether the Commission had before it evidence on which they could properly have based their award even though as a matter of fact the award had been based on improper evidence.

HENRY WOLF BIKLÉ,
FREDERIC D. McKENNEY,
FRANCIS I. GOWEN,
For Plaintiff in Error.

FILED
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JAMES D. MA

No. 706. 210

OCTOBER TERM, 1920.

IN THE

Supreme Court of the United States

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

vs.

ISAAC C. WEBER, Surviving Partner of W. F. Jacoby and Isaac C. Weber, Copartners trading under the Firm Name of W. F. Jacoby & Co., Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

WM. A. GLASGOW, Jr.,
Counsel for Defendant in Error.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920. NO. 706.

Pennsylvania Railroad Company, Plaintiff in Error,

vs.

Isaac C. Weber, surviving partner of W. F. Jacoby and Isaac C. Weber, copartners trading under the Firm Name of W. F. Jacoby & Co., Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

This case originated in a complaint before the Interstate Commerce Commission, filed in 1907.

The first report of the Commission was on March 7th, 1910 (R. 33), finding that the defendant had been guilty of unjust discrimination, and leaving for future determination the amount of damages to which the complainant was entitled.

On March 11th, 1912, the Commission filed a supplementary report (R. 16), in which it found the amount of damages to which the complainant was entitled, and entered its order directing the defendant to pay the same (R. 30).

After the first report The Pennsylvania Railroad Company filed a petition in the Commerce Court to restrain the Interstate Commerce Commission from enforcing its order,

and upon hearing, this petition was dismissed: P. R. R. *vs.* I. C. C., 193 Fed. 81. After the second report Jacoby & Co. on July 16th, 1912, filed its petition in the District Court of the United States to enforce the collection of the award made to it by the Interstate Commerce Commission.

The District Court upon trial and verdict of the jury, entered judgment for the amount of the verdict, and The Pennsylvania Railroad Company took the case to the Circuit Court of Appeals of the Third Circuit, upon writ of error, and after argument in that Court certain questions were certified to the Supreme Court of the United States and thereupon Jacoby & Co. filed a petition for *certiorari*, upon which the Supreme Court of the United States directed that the entire record should be brought there for review.

Upon argument in the Supreme Court the judgment of the District Court was affirmed, by a divided Court, and thereupon The Pennsylvania Railroad Company applied for a reargument, which was granted, and upon such reargument the judgment of the District Court was reversed upon the ground that one of the instructions asked for by The Pennsylvania Railroad Company should have been given (Mr. Justice Pitney dissenting, 242 U. S. 89). The case then came back to the District Court, and Jacoby having died, the case was revived in the name of Isaac C. Weber, surviving partner, and was re-tried before a jury in October, 1919, and resulted in a verdict for the plaintiff upon which judgment was entered (263 Fed. 945). The Pennsylvania Railroad Company then sued out a writ of error to the Circuit Court of Appeals where the judgment of the District Court was affirmed, (269 Fed. 111). The case was then brought to this Court on writ of error. This case has been pending before the Commission and the Courts for more than fourteen years. Since the case was last here the Court has affirmed a judgment of Minds, surviving partner, *vs.* P. R. R. Co., (250 U. S. 368) wherein damages were awarded to Bulah Coal Company by the Interstate Commerce Commission upon exactly the same facts, covered by the same report of the Commission (R. 16, 21, 25, 30, 31).

HISTORY OF THE CASE.

The defendants in error, W. F. Jacoby & Co., were from April 1st, 1904, until October 18th, 1905, engaged in operating a coal mine known as Falcon No. 2, on a tract of bituminous coal land, situate in Bigler Township, Clearfield County, Pennsylvania. The mine was fully equipped for operation, and on April 1st, 1904, was provided with an underground electric system for hauling the mine cars, had a first-class wooden tipple and patent dump, an ample supply of mine cars and track facilities, and the grades favored the outward movement of loaded mine cars, and the mine was regarded as one of the best equipped mines in the district (R. 35, &c., Commission's Report).

The coal in Falcon No. 2 Mine was a very superior grade of steam coal and was readily marketable in States other than the State of Pennsylvania, in interstate commerce.

In 1904 there were about 100 acres of coal remaining in the tract, and the rated capacity of the mine for car distribution made by The Pennsylvania Railroad Company during the period from April 1st, 1904, to October 18th, 1905, was 450 tons a day, and the actual average output capacity of the mine was 600 tons a day.

During the period from April 1st, 1904, to October 18th, 1905, The Pennsylvania Railroad Company was a common carrier engaged in the transportation of coal, in interstate commerce, and for the purpose of making a pro rata distribution of cars to mines, it divided its coal territory into coal districts served by the several divisions of the railroad, in one of which said districts, known as the "Clearfield District," served by the Tyrone Division of the railroad, the Falcon No. 2 was situate.

On the same division and in the same coal district there were a number of other mines belonging to the Berwind-White Coal Mining Company, the Lehigh Valley Coal Company and other mine operators, competing with Jacoby & Co. The mines of the Lehigh Valley Coal Company were on a different branch of The Pennsylvania Railroad Company known as the Snow Shoe Branch, but were in the

same coal district, were on the same Tyrone Division and paid the same rates and were carried on the same coal car distribution sheets, as Falcon No. 2.

During the period from April 1st, 1904, to October 18th, 1905, the Falcon No. 2 Mine though in operation and demanding cars continually, received far less car service than its rated capacity entitled it to, and also far less car supply than was given by the Pennsylvania Railroad during the same period to other mines in the same coal district, and on the same division above mentioned, of a similar or lower rated capacity and with similar or inferior facilities for mining and loading coal, and Jacoby & Co. were prevented from mining and shipping coal which it was entitled to ship to fill its contracts, and from accepting other available and profitable contracts and from obtaining and filling contracts which it could have obtained and filled.

In consequence, the Falcon No. 2 Mine was greatly hampered, its employees were forced to leave and seek other employment, and its cost of operation per ton materially increased. Jacoby & Co's. business also suffered by reason of inability, due to car shortage, to accept or promptly fulfill contracts at Falcon No. 2 Mine, and in October, 1905, they were obliged to go out of business and sell the mine.

In June, 1907, Jacoby & Co. filed a complaint with the Interstate Commerce Commission covering the charges of unlawful discrimination as above set forth, and asking for reparation for the damage suffered in the past. The Complaint was fully investigated, and heard by the Commission, and on March 7th, 1910, the Commission filed a report (R. 34), finding that the defendant had been guilty of unjust and unlawful discrimination against Jacoby & Co. in violation of the Act to Regulate Commerce in the respects charged.

In its Report the Commission found (R. 38), that Falcon No. 2 was not:

> "placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of distribution of defendant's available coal car equipment during the period of this action,"

and in referring to the "special allotment of 500 cars daily" to the Berwind-White Coal Mining Company, which took that number of cars out of the equipment for pro rata distribution on the Tyrone Division, the Commission found (R. 38):—

> "We see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference of one company and district, and an undue discrimination against coal operations in another district."

It further appeared in the evidence that the Pennsylvania Railroad sold 1000 of its cars to the Berwind-White Coal Mining Company, thus making them available for the shipments of that company exclusively, and as to this the Commission found (R. 39):—

> "The defendant to that extent diminished its capacity to supply the coal car requirements of other coal operations upon its lines. While the right as a legal proposition of an interstate carrier to sell its equipment has not been discussed before us in these cases and therefore will not be considered *in this report*, the least that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors."

On the last trial of the case in the District Court, it was shown (R. 163) that 500 cars were sold to the Keystone Coal and Coke Company and 700 cars to Ellsworth, making—with the 1000 to the Berwind-White Company—2200 cars, or 140 cars for distribution per day which were turned over to shippers on other divisions of the railroad and not put into pro rata distribution (R. 163); and these 140 cars per day, together with the 500 cars arbitrarily ordered to the Berwind-White Coal Mining Company (R. 162) making 640 cars per day, were arbitrarily taken out of the dis-

tribution of cars and the Tyrone Division, upon which Falcon No. 2 is situate, secured no part thereof. If these 640 cars had been distributed ratably among the several divisions, the Tyrone Division, including the Snow Shoe, would have received 10 5/10 per cent. thereof, or about 67 cars per day in addition to the cars which that division actually received (R. 177, 355). These 67 cars per day were far beyond what was necessary to furnish Falcon No. 2 all the cars required by it.

The Commission further found in its report (R. 39):—

> "For the reasons explained at some length in that case, (Hillsdale Coal & Coke Co. *vs.* P. R. R. Co.), those rules operated as an undue discrimination against these complainants (Jacoby & Co.) and we so find, but for the present for the reasons there explained we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby."

On the same day, to wit, March 7th, 1910, the Commission issued an order (R. 40) in which the nature of the practice complained of by Jacoby & Co. on the Tyrone Division was set forth, and it was—

> "ordered that the said rule, regulation and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated, and is in violation of the third section of the Act to Regulate Commerce" (R. 41).

The order then required the defendant to cease and desist

> "from any practice, and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in

the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving the same."

The question of "damages claimed by the complainants" was deferred by the order "pending further argument in the premises."

Subsequently, on March 11th, 1912, the Commission filed a supplemental report (R.16, 21), which contained the further findings of the Commission as to the complaint and damages of Jacoby & Co. In this supplemental report the Commission found:—

"We find that by reason of the discriminations ascertained and set forth in our report in Jacoby *vs.* P. R. R. Co., 19 I. C. C. 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from January 28th, 1907.

"The claimants here demanded $51,950.49. The award above made we base upon evidence adduced of record from which we find:—

"(*a*) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants was 450 tons per day.

"(*b*) That during the period from April, 1904, to March 31st, 1905, the mine was operated 275 days; and that during the second period named on the exhibits, from April 1st to October 18th, 1905, it was operated 138¼ days.

"(*c*) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,073.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

"(*d*) That the average selling price of the complainants' product for the first period was $1.212 per ton,

and in the second period $1.1670; that the cost of production, based on economical operation of the mine, with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures the loss on the tonnage which the complainant was unable to ship."

On the same day, to wit, March 11th, 1912 (R. 30), the Commission entered its order, making its original report and supplemental report a part thereof, in which it "authorized and directed" the defendant, Pennsylvania Railroad Company, "to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Co., on or before the first day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 28th, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission."

The time within which the Commission ordered the defendant to pay to the plaintiffs the amount which they were found to have been damaged having expired, the plaintiffs availed themselves of the statutory proceedings provided by Section 16 of the Act to Regulate Commerce, and filed a petition in the District Court of the United States for the Eastern District of Pennsylvania, "setting forth briefly the causes for which he claims damages and the order of the Commission in the premises," and praying the Court to enter a judgment in their favor against the defendant for the amount which plaintiffs had been damaged, as set forth in the reports and orders of the Commission which were filed with the petition as a part thereof.

This was the "petition" which by Section 16 of the Act is spoken of as "a petition for the enforcement of an order for the payment of money," and which is required to be

"filed in the Circuit Court or State Court within one year from the date of the order, and not after."

A demurrer was filed by the defendant to the petition on September 18th, 1912, and on the 12th of November, 1912, the Court handed down an opinion, overruling the demurrer; the defendant pleaded "not guilty," and on the 3d of March, 1913, the cause was tried by a jury, and a verdict rendered for the plaintiff upon which judgment was entered and The Pennsylvania Railroad Company sued out a writ of error to the Circuit Court of Appeals, and thereupon, after argument that Court certified certain questions to the Supreme Court, and upon writ of *certiorari* the entire record was ordered to be brought up by that Court, and upon argument there *the judgment of the District Court was affirmed by a divided* Court, (242 U. S. 89), and a petition being filed and granted for a reargument, upon such reargument the case was reversed by a divided Court (Mr. Justice Pitney dissenting), on the ground that the District Court had refused to give instruction No. 8 asked for by The Pennsylvania Railroad, which was as follows:—

> "8. If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs in the year ending April 1st, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their daily mine ratings, and in the period between April 1st and October 18th, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiff's mine was located had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

The case came back to the District Court for new trial, and there the whole record before the Interstate Commerce Commission was received in evidence, and in its charge the District Court instructed the jury in accordance with the point of charge No. 8, which the Supreme Court held should have been given (R. 338, 339, 341, 342).

The jury found a verdict in favor of Isaac C. Weber, surviving partner of Jacoby & Co., in the sum of $36,787.45, and the Court having overruled a motion for new trial, judgment on said verdict was entered and The Pennsylvania Railroad Company sued out a writ of error to the Circuit Court of Appeals, where the District Court was affirmed, and the case is now in this Court upon writ of error.

ARGUMENT.

I. THE CLAIM OF JACOBY & CO. WAS BASED ON THE CHARGE OF UNJUST DISCRIMINATION IN THE FURNISHING OF COAL CARS AT ITS FALCON NO. 2 MINE, DURING THE PERIODS SET FORTH; AND DURING SUCH PERIOD THE PENNSYLVANIA RAILROAD COMPANY CLAIMING TO BE UNABLE TO FURNISH ALL OF THE CARS REQUIRED OF IT, UNDERTOOK TO MAKE A PRO RATA DISTRIBUTION BASED UPON MINE RATING.

Jacoby & Co. claimed (R. 75):—

1. That The Pennsylvania Railroad Company did not assign to the Tyrone Division, upon which Falcon No. 2 mine was located, its fair proportion of all of the cars available; and

2. That such cars as were assigned to the Tyrone Division were not fairly and properly apportioned among the shippers of coal.

It appears from the record that during the period of demand for cars which The Pennsylvania Railroad Company was unable to fill, it arbitrarily ordered out of its equipment 500 cars to be assigned daily for use by the

Berwind-White Coal Mining Company on a division of the road other than the Tyrone Division (R. 38); and during the same period The Pennsylvania Railroad Company sold to the Berwind-White Coal Mining Company 1000 of its cars (R. 39), and to the Keystone Coal and Coke Company 500 cars, and to Ellsworth 700 cars, making a sale of 2200 of its cars, which would have enabled it if it had kept its cars to make a distribution of 140 cars per day (R. 163). These 140 cars per day, together with the 500 cars arbitrarily assigned to the Berwind-White Coal Mining Company daily, would have given a total per day for pro rata distribution to coal Districts, of 640 additional cars (R. 162). All of these 2200 cars which were sold, and the 500 cars arbitrarily assigned to the Berwind-White Coal Mining Company, were used upon divisions of The Pennsylvania Railroad Company other than the Tyrone Division where the Falcon No. 2 mine was located.

In the assignment of cars as between divisions, the Tyrone Division was entitled to 10-5/10 per cent. of all available cars for distribution, according to the testimony of Trump, Superintendent of The Pennsylvania Railroad Company (R. 160, 163, 177). If, therefore, the Tyrone Division had gotten its 10.5 per cent. of these cars there would have been available on that division for use each day 67 additional cars for loading coal, and Falcon No. 2 mine could have been furnished a sufficient number of cars to bring it up to its rated percentage of cars.

Therefore, the question presented to the jury was not only a question of discrimination as between shippers upon the Tyrone Division, but a discrimination as against the Tyrone Division upon which the Falcon No. 2 mine was located, and upon the trial the case was fairly submitted to the jury upon all of the facts as to the amount of damage which had been suffered by Jacoby & Co.

II. Discrimination.

(a) The Commission found (R. 38) that Falcon No. 2 Mine was not

"placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of distribution of defendant's available coal car equipment during the period of the action."

(*b*) The Commission further found as to the 500 cars assigned daily to the Berwind-White Coal Mining Company that it was difficult to determine to just what extent Jacoby & Co. were prejudiced "by that preference of a competing company's operations in another district. Nevertheless, it was inequitable in principle, and undobutedly so to some extent at least in its results, and we see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference of one company and district and an undue discrimination against coal operations in another district."

(*c*) As to the sale of the 1000 cars to the Berwind-White Coal Mining Company, and this is equally applicable to the sale of 700 cars to Ellsworth, and 500 cars to the Keystone Coal and Coke Company, the Commission found that this action by The Pennsylvania Railroad Company "indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors" (R. 49).

(*d*) The Commission further found that the rules of distribution "operated as an undue discrimination against these complainants, and we so found" (R. 39).

(*e*) And the Commission further found in its order of March 7th, 1910 (R. 41) "that the said rule, regulation and practice of the defendant, in that behalf, unduly discriminates against the complainants and other coal operators similarly situated, and is in violation of the third section of the Act to Regulate Commerce."

From the above it is clear that the Commission found that Falcon No. 2 Mine had been unjustly discriminated against both in the failure to furnish to the Tyrone Division its fair proportion of cars, and also in the pro rata division among the several mines upon the Tyrone Division. This

was an administrative question, and the finding of the Commission thereon is conclusive.

Mitchell Coal & Coke Co. *vs.* Penna. R. R. Co., 230 U. S. 247 at pages 257, 258.

Much of the brief filed on behalf of the plaintiff in error in this Court is devoted to an attempt to show that there was no discrimination against Jacoby & Co. and it is argued that there was no discrimination against the Tyrone Division, but it is submitted that the findings of the Commission are clear and conclusive on this subject.

In passing we desire to call the Court's attention to the fourteenth assignment of error (R. 371-2), set up by the plaintiff in error at pages 49-50 of their brief, where it appears that in his charge to the jury, the learned Judge referred to certain evidence which was adduced at the former trial, but was not presented at the second trial, and after his charge his attention was called to the fact that there was no evidence before the jury that some of the mines in the district which were not operated at certain times were nevertheless receiving cars, and thereupon, the Court called the attention of the jury to this inadvertence, and directed them not to consider any such suggestion, as there was no evidence upon which to base it, yet the plaintiff in error asks this Court to reverse the judgment of the District Court on this ground.

III. The second trial in the District Court.

There are a great many assignments of error presented in this record, all of which are so well disposed of in the opinion of the learned trial Judge on the motion for a new trial (R. 354), that it is hardly necessary to discuss the same. It would seem to be clear from the charge of the Court (R. 331), that the case was fairly submitted to the jury, and that there is no reasonable ground for disturbing the verdict.

IV. ASSIGNMENTS OF ERROR.

1. The first assignment of error was based upon the contention that the verdict of the jury was excessive, and it hardly seems necessary to discuss this assignment in this Court.

2. The second, third and fourth assignments of error complain that the Court declined to give to the jury the second, third and fourth points of charge requested by The Pennsylvania Railroad Company. In these points the Court was asked to make computation of percentages, and to instruct the jury upon a question of fact *entirely*, which the Court declined to do; and further these points of charge were based solely upon such cars as The Pennsylvania Railroad Company actually distributed on the Tyrone Division, and ignored entirely the fact that the evidence tended to show that the Tyrone Division was not given its fair proportion of the cars available for distribution (see opinion of the Court on motion for new trial, R. 354, 355, 356, 357).

3. The fifth assignment of error is based upon the refusal of the Court to grant the defendant's fifth point of charge and in some respects this point is identical with the point of charge for the refusal of which the case was reversed in this Court, but this point goes further, and is subject to the objection that it ask the Court to instruct the jury upon a question of fact only, and also ignores all of the testimony with reference to the discrimination against the Tyrone Division. The Court in its charge to the jury presented the law to them exactly as the Supreme Court directed (242 U. S. 89), as will be seen hereafter; but this point was objectionable on other grounds. The objection to this point is clearly set forth in the opinion of the trial Judge upon the motion for a new trial (R. 357, 358).

4. Assignments of error Nos. six and seven are based upon failure to affirm points of charge. These points

disregard all of the evidence as to the discrimination against the Tyrone Division, and the undue preference in behalf of other mining companies located on other divisions of The Pennsylvania Railroad Company (R. 358).

5. The eighth assignment of error complains of the Court's declining to direct a verdict for the defendant, and it seems hardly necessary to discuss this point.

6. The ninth assignment of error is based upon the Court's declining to grant the defendant's ninth point of charge, which was identical with the eighth point which was presented at the former trial, and which the Supreme Court adjudged should have been given. The Court declined to grant this point on the ground that it was fully covered by the charge, which is apparent from a consideration of the charge of the Court (see charge and opinion upon motion for new trial, R. 358, 359, 360). This point offered by the defendant was based upon plaintiff's Exhibit No. 10 (R. 260, 261). This exhibit was not offered in evidence by the plaintiff as the basis of its *recovery of damages*, but was a comparative statement of car distribution on the Tyrone Division, offered "for the purpose only of showing discrimination as against the Falcon No. 2 Mine" (R. 214). It was not presented by the complainant to show that it was entitled to 59.9 per cent. or any other percentage of the cars distributed as a basis upon which to calculate damages, but "for the purpose of showing discrimination."

By Exhibit No. 10 (R. 260) it appears that the mines other than Falcon No. 2 were awarded during the two periods set forth, 59.9 per cent. and 59.6 per cent. respectively of their rated car capacity, whereas the Falcon No. 2 Mine was apparently estimated in this exhibit to have received for the two periods aforesaid 28 per cent. and 23.9/10 per cent. respectively of its rated capacity. As a matter of fact and as found by the Commission, however, Falcon No. 2 Mine was not operated for 308 days during the first period and 167 days in the second period, the number of days used in the Exhibit, but was operated 275 days in the

first period and 138¼ days in the second period (R. 21). It is easily shown therefore, that the Commission in its report did not base its award of damages upon the ground that the same percentage of cars as awarded to its competitors, to wit, 59.9 per cent. and 56.6 per cent. should have been awarded to Falcon No. 2. If Falcon No. 2 had been operated for 308 days the estimated number of days in Exhibit No. 10, in the first period, the rated capacity of its mine would have ben 450 per day tons multiplied by 308 days, equal to 138,600 tons.

Its actual shipments during 275 days (R. 21) were	38,714.23 tons
Additional shipments which the Commission found would have been made during the first period (R. 21) were	35,412.02 tons
Total	74,126.25 tons

which is 53 per cent. of the rated capacity of 138,600 tons for 308 days. For the second period Exhibit 10 is based upon 167 days rated capacity, which multiplied by 450 tons per day equals for the period 75,150 tons.

Actual shipments (R. 21)	17,973.88 tons
Additional tonnage which the Commission found would have been shipped during the period (R. 21)	19,104.77 tons
Total	37,078.65 tons

which is 49 per cent. of the total rated capacity of 75,150 tons for the second period.

So it will be seen by referring to Exhibit No. 10 (R. 260, 261) that if the tonnage awarded Falcon No. 2 had been based by the Commission upon its right to ship 50.9 per cent. of its capacity for the second period of 308 days and 50.6 per cent. of its capacity for the second period of 167 days, the Commission would have based its finding upon a much larger additional tonnage for Falcon No. 2 during each of the periods, and the award of damages would have

been much greater. It must be apparent that if this Exhibit No. 10 is to be used as a comparison of tonnage for a basis of damages as between Falcon No. 2 and the other mines, the same number of days, operation must be used for all of the mines, and it is therefore apparent that the Commission did not make its award of damages to Falcon No. 2 Mine on the basis that it should have been furnished cars to ship 59.9 per cent. of its capacity during the first period of said exhibit and 59.6 per cent. of its capacity during the second period of said exhibit, and the jury in this case so found, but the Court had instructed them substantially to the same effect as point No. 9 requested by The Pennsylvania Railroad Company, and in exact accord with the opinion of the Supreme Court.

Exactly what was the basis upon which the Commission made its finding of damages we are unable to set forth with mathematical precision. The finding was certainly less than Jacoby & Co. claimed, and far less than we think the Record shows that the complainant was entitled to. Jacoby & Co.'s claim was for $51,950.40 (R. 21), but the Commission allowed them less than one-half thereof and we have no way of calculating by what process this cut in their damages was made. Although we contended that Jacoby & Co.'s damages were much greater the Commission limited their recovery to $21,094.30.

It is hardly necessary for the complainant in order to maintain this suit to mathematically calculate the basis upon which the award of damages was made either by the Commission or the jury, nor should the Court reverse a judgment for the plaintiff because it may not agree with reasons which may have been assigned by the Commission, if upon the question of fact submitted to the jury a verdict is rendered which is within the limits which the jury might properly have found, on all of the facts of the case.

7. The tenth assignment of error is based upon the Court's declining to grant the tenth point of charge submitted by the defendant. The point was as follows:—

> "10. It appears from the reports of the Interstate Commerce Commission that the Commission declined to make an award to Jacoby & Co. based upon sales of cars made by the defendant or the special orders directing the placing of 500 cars at the mines of the Berwind-White Coal Mining Company. The plaintiff therefore cannot recover because of these rules or these orders."

In the first place this point does not correctly state the facts. In the first report of the Commission of March 7th, 1910, (upon the question of discrimination alone), with reference to these 500 cars, it was found (R. 38):—

> "It is difficult to determine to just what extent these complainants were prejudiced by that preference of a competing company's operations in any district. Nevertheless, it was inequitable in principle and undoubtedly so to some extent in its results, and we see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference to one company and district, and an undue discrimination against coal operations in another district."

And again, in the same first report, the Commission found (R. 39): —

> "But for the present and for the reasons there explained we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which complainants may have been damaged thereby."

It is true that the Commission said with reference to the 1000 cars sold to the Berwind-White Coal Mining Company that that transaction would "not be considered *in this report*" (R. 39), but there is nothing to show that it was

not considered, as it should have been, *upon the re-hearing and Supplemental Report on the question of damages.*

Subsequently, there was a re-hearing of the case, and re-argument on the question of damages, and the Commission on March 11th, 1912, made its Supplemental Report awarding the damages to Jacoby & Co. (R. 21). It cannot therefore be correctly stated as a fact that the Commission did not take into consideration both the improper sales of cars and the 500 cars arbitrarily assigned to the Berwind-White Coal Mining Company in making its award of damages.

In the second place, even if the Commission had not taken into consideration these items of improper car sales and arbitrary assignment of 500 cars per day to the Berwind-White Coal Mining Company for use in other districts, the jury in this case were not debarred from considering those matters in determining the question of damages (see Opinion on Motion for New Trial, R. 361).

8. Assignment of error No. 11 was based on the failure of the District Court to affirm the defendant's point No. 11. The effect of affirming this point would have been to charge the jury that the sales of cars made to the Berwin-White Coal Mining Company and to the Keystone Coal and Coke Company could not be considered by them "as a basis for recovery in the present action, and they should consequently be disregarded by the jury."

The Commission had held that the sale of these cars indicated a desire "on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors" (R. 39), and in view of the Commission's finding and this discrimination the Court could not have charged the jury to disregard these sales of cars (see Opinion upon Motion for a New Trial (R. 361).

9. The twelfth assignment of error is based upon the defendant's twelfth point of charge, and the statement of fact set forth in this point is not correct. There was evidence tending to show that if the defendant had not ordered

500 cars to be given to the Berwind-White Coal Mining Company arbitrarily per day and had not sold the cars to the Berwind-White Coal Mining Company, Ellsworth and the Keystone Coal and Coke Company, the defendant would have had 640 additional cars per day free to distribute to coal operators on its system and that of this number the Tyrone Division would have been entitled to 10.5 per cent., or about 67 cars per day, and that from these 67 cars per day it could without difficulty have supplied cars to the Falcon No. 2 Mine in excess of what it did receive and far in excess of the number required to ship the additional tonnage of coal which the Commission said Falcon No. 2 would have shipped "if the complainants had received their fair share of the cars available for distributioin" (R. 21. See also Opinion on Motion for New Trial, R. 361.)

The Pennsylvania Railroad Company offered the evidence of Mr. Edward B. Chase, of the Berwind-White Coal Mining Company, who testified as to the 500 cars per day which were arbitrarily directed to be given to that Company, as follows (R. 244):—

> "Q. In 1904 and 1905, prior to that, they had been directed arbitrarily to give you 500 cars per day?
> "A. They had been directed, but they were never received.
> "Q. You wanted them?
> "A. We wanted all we could get.
> "Q. They ordered the people to give them to you?
> "A. Yes, sir. We never got them our records show."

And the defendant offered with the testimony of Mr. Chase its Exhibit C (R. 330), showing the number of cars per month shipped by the Berwind-White Coal Mining Company from Scalp Level Region from April, 1904, to April, 1905. In order to get the number of cars per day, as appears on this statement, the total tonnage was divided by 50, and the cars thereon referred to are 50-ton cars. At the time of this distribution a 25-ton capacity car was the unit

of distribution (R. 242), and therefore the number of cars appearing upon Exhibit C per month must be multiplied by 2 in order to show how many cars of the unit of 25 tons were received monthly by the Berwind-White Coal Mining Company. When this is done it will appear that in April, 1904, they received 470 cars. In May 480 cars, etc., and while Mr. Chase testified that the 500 cars per day were arbitrarily ordered to be delivered to the Berwind-White Coal Mining Company, but "we never got them," it would have been interesting for Mr. Chase to have shown how many the Company actually did get, as he nowhere testifies that he did not get any of these arbitrary cars.

Further, Exhibit C does not show the daily distribution of cars, it merely shows the monthly shipment of coal, and while during the month of April, 1904, it appears that the Berwind-White Coal Mining Co. shipped 6102 50-ton cars, or 12,204 25-ton cars, it does not show the daily distribution to Berwind-White Coal Mining Co. and does not negative the fact that on certain days the Berwind-White Coal Mining Company may have gotten largely in excess of 500 cars arbitrarily assigned. Mr. Chase was not asked by the defendant how many cars the Berwind-White Coal Mining Company was entitled to in the Scalp Level Region under the plan of distribution, and the jury were amply justified in concluding that a large number of cars were assigned arbitrarily to the Berwind-White Coal Mining Company which ought to have been distributed on the Tyrone Division.

Mr. Samuel Porcher, a witness for the defendant, testified that after the Pennsylvania Railroad sold 1000 cars to the Berwind-White Coal Mining Company out of its equipment, and 500 to the Keystone Coal & Coke Company, and 700 cars to Ellsworth, that the Pennsylvania Railroad made contracts for the construction of cars in place of these cars which were sold.

If, as a matter of fact, the 2200 cars had not been sold and the additional cars ordered, the Pennsylvania Railroad would have had 4400 cars for distribution.

From these facts the jury were amply justified in concluding that the limited amount of damages awarded by the Commission were fair and proper.

10. The thirteenth assignment of error is based on the refusal of the Court to affirm defendant's thirteenth point for charge, and the same objection to this point of charge applies as to the preceding assignment of error No. 12. If the defendant had not assigned daily and arbitrarily to the Berwind-White Coal Mining Company 500 cars for use on a division other than the Tyrone Division, the Tyrone Division would have been entitled daily to 10-5/10% of these cars.

The Court told the jury that there was "evidence to the effect that some of the mines in that district which were not operating at certain times were nevertheless receiving cars. There is evidence to the effect that operators who were not demanding cars were receiving cars, having cars allotted to them." When the Court's attention was called to the fact that the evidence as to idle mines was not before the jury in that trial, the Court told the jury that he desired to "withdraw any impression that has been made upon you by the Court upon that point, because it appears that there is no such evidence offered to the jury, and you are not to consider that there was any such evidence, and you are not to base your findings at all upon any such fact." The plaintiff in error now says (Brief p. 50) the Court withdrew what had been said about "idle mines," but did not what was said about operators receiving cars "who were not demanding cars." This seems very technical. The reason cars were not demanded of course was that the mines were idle, and when the Court withdrew "any impression that had been made" upon the jury "on that point" it is difficult to see what more could have, in fairness, been done.

11. The fourteenth assignment of error is based upon the charge of the Court, and is discussed at pages 49-50 of

the brief for The Pennsylvania Railroad Company. It is charged the Court inadvertently told the jury that "there is evidence to the effect that some of the mines in that district which were not operating at certain times were nevertheless receiving cars." Immediately after the close of the Court's charge attention was called by counsel for the plaintiff to the fact that there was no such evidence upon this second trial, although such evidence had been offered at the former trial, and thereupon the Court immediately charged the jury as follows (R., p. 347):—

> "GENTLEMEN:—Counsel have called my attention to the fact that the Court inadvertently referred to testimony which was not in this case, that is, as to the deliveries by the Railroad Company of cars to idle mines, and I want to withdraw any impression that has been made upon you by the Court upon that point, because it appears that there is no such evidence offered to the jury, and you are not to consider that there was any such evidence and you are not to base your findings at all upon any such fact."

It would hardly seem possible to reverse this case upon this inadvertence of the Court so promptly corrected.

12. The fifteenth and sixteenth assignments of error based upon the Court's charge do not seem to require any discussion. The excerpts from the charge referred to in the fifteenth assignment of error seems to have been clearly correct and in the sixteenth assignment of error the quotation from the charge of the Court shows that the Court was conforming its view of the law to the opinion of the Supreme Court.

13. The seventeenth assignment of error is based upon the charge of the District Court which seems to be unobjectionable and is not discussed in the brief of The Pennsylvania Railroad Company.

14. The eighteenth assignment of error is based upon the entry of judgment in favor of the plaintiff and against the defendant on the verdict of the jury.

We submit, in conclusion, that this case was fairly presented to the jury in the charge of the Court, and that the judgment upon the verdict of the jury should be affirmed.

Respectfully submitted,

WM. A. GLASGOW, JR.,
Counsel for Defendant in Error.

SEPTEMBER, 1921.

PENNSYLVANIA RAILROAD COMPANY *v.* WEBER, SURVIVING PARTNER OF JACOBY AND WEBER, COPARTNERS, TRADING UNDER THE FIRM NAME OF W. F. JACOBY & COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 210. Argued October 13, 1921.—Decided November 7, 1921.

1. In an action to enforce reparation awarded a shipper by the Interstate Commerce Commission as damages resulting from unfair practices of the defendant carrier in the distribution of coal cars, the findings and order of the Commission are *prima facie* evidence of the facts therein stated. P. 90.
2. In such an action the award, though its amount appear by the Commission's own record to have been calculated upon an erroneous basis, (see s. c. 242 U. S. 89,) may be sustained by evidence before the Commission, supplemented at the trial, tending to prove that damages equal to the award resulted from the unfair practices condemned by the Commission, as shown by its report. P. 91.

269 Fed. Rep. 111, affirmed.

ERROR to a judgment of the Circuit Court of Appeals which affirmed a judgment for damages entered upon a verdict in the District Court, in an action to enforce a reparation order of the Interstate Commerce Commission. See s. c. 242 U. S. 89.

Mr. Henry Wolf Biklé, with whom *Mr. Frederic D. McKenney* and *Mr. Francis I. Gowen* were on the brief, for plaintiff in error.

Mr. William A. Glasgow, Jr., for defendant in error.

Mr. Justice Day delivered the opinion of the court.

This cause has been the subject of much and long continued controversy. This is its third appearance in this court. The previous history of the litigation is set out in 242 U. S. 89. The action is based upon a reparation order made by the Interstate Commerce Commission in favor of Jacoby & Company. A recovery was had in the sum awarded by the Commission, with interest. At the first trial plaintiffs did not introduce the record of the testimony before the Commission. The defendant railroad company introduced testimony tending to show that the Commission in making its award of damages had used a table, attached as exhibit 10 to the record of the case, showing a discrimination of the railroad company against the plaintiffs in the distribution of coal cars in times of shortage, and produced a witness who testified that the effect of the use of the percentages in that table as the basis of awarding damages by the Commission was to give plaintiffs the undue preference in the distribution of coal cars which favored shippers had received. That being so, this court held that the recovery of a sum thus arrived at would defeat the purpose of the act to place shippers on a basis of equality. For the refusal of the trial court to give a charge based upon such use of the table the judgment of the Circuit Court of Appeals for the Third Circuit, affirming that of the District Court, was reversed, and the cause remanded for a new trial. The second trial in the District Court resulted in a verdict and judgment for the plaintiffs in the sum awarded by the Commission with interest. 263 Fed. 945. That judgment was affirmed

by the Circuit Court of Appeals, 269 Fed. 111, and the case is again here.

We need not repeat the discussion concerning distribution of cars in times of shortage which was held to result in undue advantage. See 242 U. S. *supra*, pp. 90, 91; *Hillsdale Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 19 I. C. C. 362, 363, 364.

At the last trial the testimony before the Commission was put in evidence, with some additional testimony tending to show that plaintiffs had been discriminated against because of the special allotment to the Berwind-White Company of five hundred cars daily; and the sale to it, and to other companies, of a large number of cars in times of car shortage. There was evidence tending to show that but for these discriminations the plaintiffs would have received a sufficient number of cars to furnish them with all they needed during the periods complained of.

The Commission in the report condemned the practice of giving to the Berwind-White Coal Company five hundred cars daily by special allotment, and the selling of the company's own cars during the same period to favored shippers, thereby diminishing its capacity to supply the coal car requirements of other coal companies along its line.

When the Commission came to assess damages it allowed the plaintiffs $21,094.39 with interest from June 28, 1907. The order on which this award was made is set forth in 242 U. S. *supra*. Upon the new trial, with the additional testimony and the whole record of the Commission introduced in evidence, the judge, after charging the jury that there might be a recovery if the discriminations alleged and proved resulted in damages in the sum awarded by the Commission, charged:

"If you should find that the conclusion of the Interstate Commerce Commission that the plaintiff in the year ending April 1, 1905, should have received cars equal in

capacity to 59.9 per cent. of the aggregate of their mine's daily rating, and in the period between April 1 and October 18, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their mine's daily rating—if you should find that that conclusion was reached or arrived at because of the evidence presented by the plaintiff that the aggregate of the cars placed by the defendant at certain mines which had been selected for the purpose of comparison from those comprised in the region in which the plaintiff's mine was located, had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines, [These being the percentages of cars given to preferred companies as shown in Exhibit 10.] for the basis of the Commission's conclusion, then the award was an erroneous one, and under those circumstances the finding of the Commission would lose its effect as prima facie evidence, and you would only be justified in finding for the plaintiff if you find that from the other evidence offered before the Commission, either of discrimination through distribution to favored shippers in the Tyrone region or through withholding cars from the Tyrone region, which should have been distributed there, the Commission was justified in arriving at that conclusion. If you find that the Commission was justified in arriving at that conclusion, or are satisfied from that evidence, and that evidence is reinforced by further evidence that the plaintiff has offered in the case, then you would be justified in finding a verdict in favor of the plaintiff, and assessing damages at the amount found by the Commission.

"If, however, you should find that that was an erroneous finding, then it would be your duty to find to what extent the plaintiff was damaged, I mean in case you find that the plaintiff was actually damaged you would have to find to what extent the plaintiff was actually damaged. If you leave out the evidence before the Commission the

Court is unable to say that there is any other evidence standing alone which would be sufficient, but the evidence which was before the Commission has all been offered before you, and some additional testimony. The proper basis of damages in that case, if the Commission has not reached the proper basis, would be upon the theory set out in the Commission's report, but not based on a comparison between what the favored shippers received and what the plaintiff received.

"If the plaintiff is entitled to recover and has suffered damages, the measure of damages would be the loss in operating, upon the coal that was actually shipped, through discrimination in favor of other shippers, together with the profits it would have made on the coal they would have been able to ship. The question as to what coal they would have been able to ship is a question for you gentlemen to decide under the evidence in this case. You have had the schedules laid before you, counsel have argued the case to you and explained the grounds on which they respectively base their demand on the one side and the defense on the other, and the questions of fact are for your determination. The defendant has offered in evidence, and has shown you these facts, in regard to the 59.9 per cent. and the 59.6 per cent., and as I have already instructed you, if you find the Commission's finding was based on that, then the Commission's finding as to the amount of damages suffered should not be considered by the jury, but the jury will be obliged independently, if they can do so, to arrive at a proper amount of damages.

"If the jury do not believe that the plaintiffs suffered any damages, or do not believe that they were discriminated against in favor of other shippers, either by the distribution of cars that were sent into this region or by the failure of the railroad company to send cars to the Tyrone region which should have been distributed there, then it

would be your duty to find a verdict in favor of the defendant."

As there was substantial testimony in the record to support the finding of the Commission in awarding damages in a sum at least equal to the amount assessed by it, the principal question to be decided is: May a plaintiff recover in such circumstances in a suit based upon a reparation order of the Interstate Commerce Commission when there is testimony fairly tending to show that recovery was justified because of unfair practices in the distribution of coal cars in times of shortage, which practices, as its report shows, were condemned by the Commission, although it may appear that the sum awarded by the Commission was actually based upon an erroneous calculation?

In determining the rule to govern this situation we must bear in mind that the Commission is empowered to act upon questions of unfair practices and discrimination. *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, and the previous cases in this court cited at p. 469. While this is true, when an action is brought upon a reparation order of the Commission, as it may be under § 16 of the Act to Regulate Commerce, its findings and order are *prima facie* evidence of the facts therein stated. *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412; *Second Meeker Case*, 236 U. S. 434; *Mills* v. *Lehigh Valley R. R. Co.*, 238 U. S. 473. These cases have disposed of the question of the right of the defendant to attack the *prima facie* value of the award, and have dealt with the nature of the award of the Commission in view of the statutory provisions as to its character.

That the Commission used a wrong basis in awarding damages, now that the whole record is before us, admits of no doubt. Indeed, the coincidence in the award made and the use of the percentage table shown in Exhibit No. 10 is difficult to account for except upon the basis pointed

out by the witness introduced by the defendant, whose testimony was made the basis of the request to charge, the refusal of which led to the reversal of the judgment in 242 U. S. *supra.*

The defendant in error argues that the Commission could not have used this table because it covers a different period of operation as evidenced by the number of days shown than the Commission found to have been the period covered by the operation of the plaintiffs' mine. Nevertheless, the coincidence of percentage and award remains, and the conclusion is inescapable that the Commission in determining the sum awarded used percentages which had the effect of placing the plaintiffs on a basis of equality with the favored companies. On the other hand, there is testimony tending to show that had the cars been distributed upon a basis of general equality approved by the Commission, and without resort to practices condemned by it, there would have been cars enough to have furnished plaintiffs with a sufficient number to meet their trade and requirements during the period in question. Under the circumstances here shown, when the case is fairly and fully submitted, as it was in the charge of the judge to the jury, giving a correct basis upon which there might be a recovery of damages, and there is testimony tending to show damages in at least the sum awarded by the Commission, there is no prejudicial error because of the erroneous calculation of the Commission which was the basis of its award.

Other questions are argued, but they are disposed of satisfactorily in the opinion of the Circuit Court of Appeals (269 Fed. *supra*), and in the opinion of the trial judge upon the motion for a new trial (263 Fed. *supra*).

It follows that the judgment of the Circuit Court of Appeals must be

Affirmed.